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PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.; PLANNED PARENTHOOD CENTER OF EL PASO; STEWART R. MOTT; STEPHEN L. ISAACS; SOSAMMA LINDSAY, on behalf of herself and others similarly situated; and JANE DOE, on behalf of herself and others similarly situated,

Petitioners,

—v.—

AGENCY FOR INTERNATIONAL DEVELOPMENT, and RONALD W. ROSKANS, as Administrator of the Agency for International Development,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Can the United States government, consistent with the first amendment, restrict the wholly private speech that American citizens and organizations conduct in association with private foreign organizations through conditions the government imposes on its subsidies to foreign organizations?

2. Can the United States government, consistent with the first, fifth and ninth amendments, prevent American women from obtaining appropriate information about abortion from wholly private foreign medical institutions through conditions the government imposes on subsidies to those institutions for unrelated programs?

3. Can the United States government, consistent with the first amendment, condition a subsidy to a domestic private organization on the surrender by the organization of its right of free speech?

4. Where Congress has enacted one set of limits on the use of government funds for abortion-related activities, can the executive branch unilaterally impose more restrictive limits?

PARTIES TO THE PROCEEDING

All parties to this proceeding in the court of appeals are listed in the caption. There are no parent or subsidiary corporations to the corporate parties.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Planned Parenthood Federation of America, Inc., Planned Parenthood Center of El Paso, Stewart R. Mott, Stephen L. Isaacs, Sosamma Lindsay, on behalf of herself and others similarly situated, and Jane Doe, on behalf of herself and others similarly situated, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals are reported at 915 F.2d 59 (2nd Cir. 1990) and 838 F.2d 649 (2nd Cir. 1988). The first opinion of the district court is reported at 670 F. Supp. 538 (S.D.N.Y. 1987). The second opinion is not officially reported, but can be found at 1990 WL26306; 1990 U.S. Dist. LEXIS 2430 (March 7, 1990). All of the opinions appear in the Appendix to this petition.

JURISDICTION

The judgment of the court of appeals that finally granted respondents' motion to dismiss was entered on September 19, 1990. On November 30, 1990, Justice Marshall extended the time for submitting this petition to and including January 17, 1991. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The text of the first, fifth, and ninth amendments to the United States Constitution, and the relevant provisions of the Foreign Assistance Act of 1961, as amended, 22 U.S.C.

§§ 2151 *et seq.* (1988) and of the Standard AID Contract Clause at issue in this case are set forth in the Appendix.

STATEMENT[1]

I. AID's Clause.

The Agency for International Development (AID) is a major provider of funds for family planning programs in developing countries.[2] In 1990, AID's international family planning grants totaled approximately $220 million, which is approximately 40% of all family planning support provided by donor countries. For the most part, AID operates this program by entering into cooperative agreements with American organizations. The American organizations develop, fund, and support with subgrants of AID funds, direct service programs run by foreign organizations, both governmental and private.

In 1984, at the International Conference on Population at Mexico City, the United States government issued a statement (the Mexico City Statement) outlining its policies on international population issues. Among the wide range of pronouncements in the Mexico City Statement was the declaration that the government would not "contribute to separate nongovernmental organizations which perform or actively promote abortion as a method of family planning in other nations." Mexico City Statement at 5.

Ostensibly to implement this declaration, AID prepared the Standard Clause (Clause) that is the subject of this lawsuit, to be included in all cooperative agreements and grants for international family planning assistance. However, the Clause was drafted so as to suppress the constitutionally protected

1 This case was disposed of on the government's motion to dismiss. The allegations of the complaint must therefore be taken as true. *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

2 The Foreign Assistance Act of 1961, 22 U.S.C. §§ 2151-2429a-1 (1988), authorizes funding for international family planning assistance. Authority to run the program has been delegated by the President to AID.

speech of individuals and groups such as petitioners, and to force organizations such as petitioner Planned Parenthood Federation of America (Planned Parenthood Federation), which was a cooperating agency with AID, either to espouse ideas that negate the constitutional right to abortion and conflict with their principles on freedom of choice, or to give up AID family planning funds.[3]

The Clause reaches beyond limiting the uses of AID funds and beyond limiting the activities of AID-supported projects. The Clause, as a condition of eligibility for AID funds, restricts a recipient's wholly private activities: activities neither funded by AID money nor related to projects funded with AID money. These restrictions, when imposed on foreign recipients of AID funds, directly and substantially interfere with petitioners' ability to speak and associate in foreign countries to promote a viewpoint disfavored by AID.

The Clause requires that foreign nongovernmental organizations (NGOs) agree, as a condition of receiving AID funding, not to "actively promote[ ] abortion as a method of family planning," even with non-AID funds.[4] Activities that are defined as "actively promoting abortion as a method of family planning,"[5] and therefore prohibited by the Clause, include providing information about the benefits and availability of abortion;[6] advising women when abortion is an

3 This has, in fact, happened. After the decision of the court of appeals and the expiration of a preliminary injunction, Planned Parenthood Federation's cooperative agreement was not renewed because of its unwillingness to agree to and enforce the Clause.

4 A.77a ¶ (d)(1). A wholly separate Clause provision, not challenged here by petitioners, repeats the statutory prohibition on use of AID's own funds for abortion related activities.

5 Under the Clause, "Abortion is a method of family planning when it is for the purpose of spacing births." The definition explicitly "includes, but is not limited to" abortions to protect the physical or mental health of the woman. The only exceptions are for rape, incest, and pregnancies where the woman's life would be endangered. A.80a-81a ¶¶ (d)(10)(i) and (iii)(B).

6 The Clause restricts only information about the potential benefits of abortion and only lobbying in favor of abortion rights; there are no limits on grantees' counseling about risks or drawbacks of abortion, nor on lobbying to restrict abortion rights.

available option;[7] lobbying to liberalize abortion laws or to maintain existing abortion rights; conducting a public information campaign on the benefits or availability of abortion; and providing referrals for abortion. A.81a ¶ (d)(10)(iii)(A)(I)-(IV). The Clause does not have exceptions for factually accurate information, medically necessary information, or information that may be legally provided under the laws or customs of the country involved.

The Clause applies to all parts of a recipient institution, including universities and hospitals, even if the recipient institution's AID-funded family planning project is only a tiny, separately run part of its overall activities.[8] A.77a-79a ¶ (d)(1)-(4). Thus, for example, because the University of East Africa in Kenya receives AID support for a small family planning project, the Clause limits all of its activities that are financed from other sources, including setting the curriculum of its nursing school, at which one of the petitioners is a teacher.

In the administration of their cooperative agreements, domestic organizations are required to adopt and enforce the Clause's definition of "performing and promoting abortion

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7 The only circumstance in which information that abortion is an available option can be given is "passively responding to a question regarding where a safe, legal abortion may be obtained . . . if the question is specifically asked by a woman who is already pregnant, the woman clearly states that she has already decided to have a legal abortion, and the family planning counselor reasonably believes that the ethics of the medical profession in the country require a response regarding where it may be obtained safely." A.81a ¶ (d)(10)(iii)(A)(II).

8 The Clause's effort to dictate the conduct of foreign organizations in foreign countries is inconsistent with international law standards, which limit a nation's jurisdiction to prescribe conduct, subject to exceptions such as national security, to conduct within that nation's territory. American Law Institute, *Restatement of the Law of Foreign Relations of the United States*, §§ 402, 403. Moreover, as a matter of U.S. constitutional law, this Court has never explicitly resolved the question of the degree to which the first amendment limits the actions of the United States government in its dealings with foreigners overseas. Motions of proposed foreign parties to intervene, which were pending in the district court, were mooted by the lower courts' dismissal of the claims of the domestic plaintiffs. Therefore, this case does not present any issue of the rights of foreigners.

as a method of family planning." They must obtain agreement to the terms of the Clause from their foreign nongovernmental subgrantees, they must monitor compliance with the Clause, and they must investigate possible infractions if either they or AID have reason to believe the foreign subgrantees are engaging in speech in violation of the Clause. A.77a-78a ¶¶ (d)(3), (d)(4)(iii).

The Clause's limits on wholly private speech apply only to foreign organizations that are not government instrumentalities. Foreign governmental organizations that engage in the abortion related speech proscribed by the Clause are subject only to the requirement that the AID money not be used for the prohibited speech and that the AID funds be placed in a segregated account. A.83a ¶ (d)(12).

II. The Clause's Effect On The Exercise By Americans Of Their Constitutional Rights.

1. Planned Parenthood Federation has a large privately funded program to support the right to legal abortion abroad. This program includes education, counseling, and advocacy. Other petitioners include Planned Parenthood of El Paso, Texas, which has a cooperative relationship with an AID grantee in Mexico that makes possible communication on a wide range of subjects related to abortion, an individual American citizen who makes contributions to organizations active in advocacy for legal abortion overseas, and an American scholar who works with overseas groups for reform of restrictive abortion laws. For the overseas speech of these petitioners (hereafter referred to collectively as Planned Parenthood) to be effective, it must be conducted in association with foreign groups in the countries concerned.

The Clause cripples the ability of Planned Parenthood to undertake with its own funds in other countries such cooperative projects involving speech intended to preserve or advance abortion rights, or to provide information about abortion. The Clause uses the immense leverage of AID funds to prevent privately funded speech with which the United States government disagrees by forcing foreign organi-

zations that participate in cooperative speech with Planned Parenthood to choose between continuation of the speech and eligibility for vastly greater U.S. international family planning funds. The Clause does not allow the foreign organizations to resolve this conflict by separating their participation with Planned Parenthood from their AID-funded activities.[9] The foreign organizations affected are the most logical and effective partners or potential partners for Planned Parenthood.

In the words of one federal judge who examined the Clause:

> There is no pretense on AID's part, however, that the [Clause] affects only foreign NGOs. The [Clause] impacts powerfully on domestic NGOs . . . that use their own private resources to enable poor women, at home and abroad, to gain access to abortion services. The [Clause] effectively picks off or buys up the audience or associates abroad that organizations like [Planned Parenthood] must have if they are to act in the international arena.

DKT Memorial Fund v. Agency For International Development, 887 F.2d 275, 300 (D.C. Cir. 1989) (dissenting opinion).

2. Petitioner Sosamma Lindsay[10], an American citizen, is Dean of the College of Nursing of the University of East Africa in Barroton, Kenya. The University, of which the College of Nursing is a part, receives AID funds for a program in which students distribute information about contraception and family planning within the community. This program is entirely separate from the College of Nursing, which receives no AID money. As part of the nursing curriculum, Lindsay

9 The Clause also attributes to an organization that receives AID funds the speech activities of legally distinct but commonly controlled organizations A.82a-83a ¶ (d)(11).

10 Lindsay sued as the representative of a class of people employed by foreign NGOs subject to the Clause. At the time the motion to dismiss was granted, however, no class had been certified.

teaches about the availability of abortion (which is legal in Kenya on grounds broader than those recognized in the Clause) and about the role and responsibility of a nurse in advising, counseling, and supporting a patient confronted by an unwanted, medically risky, or otherwise problematic pregnancy.

Lindsay's freedom to speak in accordance with her personal views and the ethics of the nursing profession is restricted because the University of East Africa is required by the Clause to agree not to operate any program that provides advice or information about the availability of abortion, other than to save the life of the woman or in cases of rape or incest.

3. Petitioner Jane Doe[11], an American citizen, is a patient of the First Foundation Medical Center, a private hospital in Lagos, Nigeria. The hospital provides general medical services, which are not supported by AID. Doe relies on the hospital for these general, non-AID funded medical services, including gynecological and obstetric advice and care. The hospital receives support from AID for expansion of a family planning counseling service. Because of the Clause, the hospital's general medical services, even though separate from and not supported with AID funds, are prevented from giving Doe accurate, complete, and professionally required advice and information related to abortion. This restriction thus interferes with Doe's right to make decisions concerning contraception and child-bearing on the basis of counseling and medical advice that reflect the full range of available options.

4. In addition to its wholly private international program, Planned Parenthood Federation was at all times relevant to this litigation a major grantee of AID family planning funds. Compliance with the Clause would have required Planned Parenthood Federation to monitor virtually all speech activities of its foreign subgrantees of AID funds. Planned Parenthood Federation thus would have been forced to espouse and

11 Doe sued as the representative of a class of women who rely for medical care on entities subject to the Clause. At the time the motion to dismiss was granted, however, no class had been certified.

to enforce upon its subgrantees a government view about abortion that is antithetical to Planned Parenthood Federation's principles.

III. History Of The Litigation.

In 1987 petitioners filed this action in the United States District Court for the Southern District of New York. The complaint alleges that the Clause exceeds AID's authority under the Foreign Assistance Act and that the Clause is unconstitutional.

The district court dismissed the complaint, holding that the requirement did not violate the Foreign Assistance Act and that the constitutional claims were nonjusticiable political questions. A.50a-74a. The court of appeals affirmed the statutory ruling and reversed the political question ruling. *Planned Parenthood Federation of America v. AID*, A.33a-49a. (*Planned Parenthood I*)

After remand, the district court again dismissed the constitutional claims, A.17a-32a, and the Second Circuit Court of Appeals affirmed that holding. *Planned Parenthood Federation of America v. AID*, A.1a-16a (*Planned Parenthood II*).

In *Planned Parenthood II*, the court of appeals characterized the Clause as implementation of a government policy not to subsidize the exercise of a right, and thus not subject to strict scrutiny. The court characterized the harm caused by the Clause as an "incidental effect" of the policy, because the Clause does not prohibit petitioners from associating and speaking. In the court's view, the harm caused by the Clause was merely "the result of choices made by [the] foreign NGOs." A.11a. Thus the court concluded that the Clause was not subject to strict scrutiny. Applying a "rationally related" test, the court rejected petitioners' first amendment challenges.

For the same reason, the court rejected Doe's claim that a penalty (ineligibility for AID funds) imposed upon her hospital for giving her information about abortion interfered with her right to informed choice and medical self-determination. The court stated that Doe's claim was not the "substantial

constitutional question" identified in *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980) (substantial constitutional question arises if Medicaid benefits withheld because woman exercises right to terminate pregnancy), and referred to in *Webster v. Reproductive Health Services*, 106 L. Ed. 2d 410, 431 n.8, 109 S. Ct. 3040, 3052 n.8 (1989) (whether state can bar doctors who perform abortions in private facilities from use of public facilities). A.15a-16a.

REASONS FOR GRANTING THE PETITION

This case presents significant constitutional questions about the power of the United States government to restrict fundamental constitutional rights through conditions attached to subsidies. The dispute arises in the context of the international family planning program; but the question of the power to use the substantial leverage of government funds to restrict fundamental rights arises in other contexts as well.[12]

This Court should grant this petition because the court of appeals has rendered a decision on these important questions of federal constitutional law in a way that conflicts with the applicable decisions of this Court. Sup. Ct. R. 10.1(c).

I. The Clause Limits Americans' Speech And Association.

The Constitution protects Americans from government abuse of power overseas as well as within our borders. *Reid v. Covert*, 354 U.S. 1 (1957). The foreign policy powers of the executive branch must be exercised in conformity with constitutional limits on all governmental power. *United States*

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12 *See, e.g., State of New York v. Sullivan*, 889 F.2d 401 (2nd Cir. 1989), *cert. granted sub nom., Rust v. Sullivan*, 110 S. Ct. 2559 (1990) (argued October 30, 1990). *See also Bella Lewitzky Dance Foundation v. Frohmayer*, Case No. CV 90-3616 JGD, (C.D. Calif. Jan. 9, 1991).

As set forth in this petition, the restrictions here are more egregious than those in *Sullivan*. *See* n.17 *infra*. Therefore, a reversal of the court of appeals in *Sullivan* would indicate a remand for reconsideration here, while an affirmance in *Sullivan* would not indicate either a denial of this petition or an affirmance of the court of appeals here.

v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). Accordingly, the first amendment does not stop at the water's edge, but affords Americans the right to speak overseas and to associate for speech with foreigners. *Lamont v. Postmaster General*, 381 U.S. 301 (1965). *See also Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Haig v. Agee*, 453 U.S. 280 (1981).

This case presents the question of whether the government can use the immense leverage of its subsidies to foreign organizations as a means to circumvent these holdings, and restrict Americans' privately financed speech in association with those foreign organizations. No government funds are involved in the suppressed speech, and it is entirely separate from government funded projects.

The Clause operates to achieve exactly that result. It forces foreign organizations that associate in wholly private speech with Planned Parenthood to cease that speech in order to be eligible for the vastly greater U.S. international family planning funds. If the government can bribe Planned Parenthood's prospective foreign partners to refuse to associate with Planned Parenthood then Planned Parenthood's speech and association will be as effectively stifled as if it had been directly prohibited.

The only two opinions in the federal courts (other than in this case) to address this constitutional question both reached conclusions consistent with this Court's holdings, discussed below, and in conflict with the court of appeals holding sought to be reviewed. In *DKT Memorial Fund*, although the majority did not reach this issue, the dissent[13] did conclude that "[a] condition . . . designed to entice away DKT's audience and allies is unconstitutional." 887 F.2d at 301. Similarly, in *Pathfinder Fund v. Agency for International Development*, 746 F. Supp. 192 (D.D.C. 1990), *appeal docketed*, No. 90-5388 (D.C. Cir. Nov. 30, 1990), the District Court for the District of Columbia addressed this issue, and concluded that a funding condition which, " 'directly and substantially' interferes with plaintiffs' ability to associate

13 The majority concluded that in DKT's situation this issue was not ripe. 887 F.2d at 296-97. No one has ever suggested a ripeness problem here.

with foreign NGOs" is subject to strict scrutiny.[14] *Id.* at 196. Thus, there is a conflict between the court of appeals application of this Court's holdings to this case and their application by other federal court judges who have considered the same issue.

The Clause also restricts the speech of American citizens, such as petitioner Lindsay, who are employed by institutions that seek to be eligible for the U.S. funds. Even though Lindsay's nursing school curriculum is institutionally, geographically, and financially separate from her university's AID-supported contraceptive distribution project, the Clause means that the curriculum's objective, medically appropriate discussion of abortion disqualifies the university from continued AID funding.

The court of appeals, however, found that petitioners' rights are not thus violated. It did so by characterizing petitioners' injuries as "an incidental effect from the refusal to subsidize the exercise of a constitutional right . . . ." A.12a. Under this Court's holdings, however, the injuries complained of are not "incidental effects," nor are they the result of a "refusal to subsidize."

A. Under This Court's Decisions, The Injuries Caused By The Clause Are Not "Incidental."

This Court has repeatedly recognized that the rights of speech and association necessarily require the action of more than one person and that restrictions on one of the parties affect the rights of the other parties as well. *See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756-57 (1976) (protection afforded is to the communication, and to its source and recipient as well); *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974) (censorship of a communication "necessarily impinges on the

14 The district court dismissed the complaint because the *Pathfinder* plaintiffs failed to demonstrate that the Clause "significantly hinder[ed]" their private overseas activities. 746 F. Supp. at 199. Here, petitioners' complaint surely alleges a substantial burden, *see* note 16 *infra*, and, provided the same opportunity as in *Pathfinder*, petitioners would factually prove that claim.

interest of each" party); *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 801 n.13 (1988) (regulation of professional fundraisers "affects the speech of the clients or causes with which they are associated"). Therefore, the disqualification of foreigners if they do not agree to stop associating with Americans for speech improperly interferes with the Americans' rights, independent of any rights of the foreigners or of foreign groups, because it induces one of the two essential parties to end the association.

This Court has specifically recognized that when the government acts in ways that threaten to discourage an organization's associates from continuing to work with it, the organization's own rights are invaded. In *NAACP v. Alabama*, 357 U.S. 449 (1958), and in *Bates v. City of Little Rock*, 361 U.S. 516 (1960), this Court overturned requirements that local branches of the NAACP disclose their membership lists. This Court reasoned that, independent of its impact on the rights of the individual members, disclosure would harm the organization itself by "induc[ing] members to withdraw . . . and dissuad[ing] others from joining."[15] *NAACP*, 357 U.S. at 463.

In this case, just as the disclosure requirement in *NAACP v. Alabama* impaired the NAACP's ability to attract and retain supporters, so the disqualification provisions of the Clause impair Planned Parenthood's ability to attract and retain foreign associates for the purpose of "foster[ing] beliefs which they admittedly have the right to advocate." *NAACP*, 357 U.S. at 463.

Likewise, in *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), this Court held that publishers' rights were violated by governmental threats and intimidation directed at distributors of their books, even though no action was taken directly against

15 See also, *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 97-98 (1982) (invalidating requirement of disclosure of recipients of campaign disbursements as applied to minor party historically subject to harassment); *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (exempting from disclosure requirements contributors to minor parties that showed probability of reprisals).

the publishers, and even though the distributors themselves evidently did not complain of the governmental pressure. The publishers there were in the same posture as Planned Parenthood here: the government was interfering with their constitutional freedoms by "persuading" their allies not to associate with them.

The court of appeals' cavalier remark that the "incidental effect from the refusal to subsidize" here "simply is not comparable to . . . the censorship by means of intimidation . . . in *Bantam Books*," A.12a, opens the door to unlimited use of pressure on intermediaries to inhibit the rights of those the government dislikes.

This Court has made clear that injuries to speech are not "incidental" where the effect of the restrictions is substantially to restrict the rights of the complaining party. In *Lyng v. International Union UAW*, 485 U.S. 360 (1988), this Court held that a classification for purposes of eligibility for a government benefit is subject to strict scrutiny if it "directly and substantially interfere[s]" with the affected parties' "ability to associate," or if it "order[s]" that they not associate, or if it "prevent[s] them from associating together or burden[s] their ability to do so in any significant manner." *Id.* at 366. *See also Pathfinder*, 746 F. Supp. at 195. The allegations in Planned Parenthood's complaint fully meet these criteria.[16]

The Clause targets the means of overseas speech and association that Planned Parenthood believes is most effective: namely speech in association with overseas organizations whose experience, expertise, and local reputation also make them prime candidates for AID funding. That Planned Parenthood may be able to find some other, less effective, partners for its overseas speech is irrelevant. This Court has made clear that restrictions on the means of speech preferred by a speaker cannot be justified by the availability of alternative channels for communication, for "[t]he First Amendment

16 The complaint alleges, for example, that as a result of the Clause, Planned Parenthood will be prevented from associating for purposes of communication related to abortion with many of the most logical and effective foreign partners in such communication. Complaint, ¶ 54. *See also, e.g.*, ¶¶ 84, 86-88.

protects [a party's] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988).

Less demanding scrutiny is particularly inappropriate, as this Court has reiterated in each of its past two terms, when the government interest at issue is directed at the suppression of expression. In *Texas v. Johnson*, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989) this Court addressed the applicability of a less demanding standard of review to government imposed restrictions where the government's defense was that the restrictions were addressed to conduct, and any impact on first amendment freedoms was "incidental." This Court reiterated the rule established in *United States v. O'Brien*, 391 U.S. 367 (1968), that "incidental" restrictions are subject to more lenient scrutiny only when the government's interest is "unrelated to the suppression of expression," *Texas v. Johnson*, 105 L. Ed. 2d at 355, 109 S. Ct. at 2541, and held that when the regulation shows on its face that the government's "concerns blossom only" when a message is communicated, then the government interest is "related 'to the suppression of free expression.' " 105 L. Ed. 2d at 357, 109 S. Ct. at 2542. *See also United States v. Eichman*, 110 S. Ct. 2404 (1990).

The restrictions here, although ostensibly imposed on foreign NGOs, were intended to and actually do substantially restrict the speech of Planned Parenthood. Moreover, by its very terms, the Clause reveals that the government's "concern blossoms" upon the communication of a message about abortion. Therefore the Clause is related to the suppression of expression and subject to strict scrutiny.

Nonetheless, the court of appeals characterized the impacts on Planned Parenthood's rights as "incidental," held that reliance on cases such as *Bantam Books* and *Eichman* was "without merit," A.12a, and applied only a "rational relationship" standard in reviewing the restriction.

B. Under This Court's Decisions, The Clause Is Not A Refusal To Subsidize.

The court of appeals' treatment of the Clause as a "mere refusal to subsidize," A.10a, is a mischaracterization, and the court of appeals' corresponding legal conclusion misapplies this Court's decisions in cases where limits on government funding have been at issue.

The Clause restriction on eligibility for AID funds is limited neither to activities paid for by AID, nor even to those projects or programs of a foreign NGO that are supported by AID funds. The restriction applies throughout the entire foreign nongovernmental organization that is the recipient of the funds. The Clause extends beyond any speech funded by the AID dollars to sweep within it *all speech* conducted by the organization or institution that is the recipient of the grant. Nongovernmental organizations, in contrast to governmental grantees, cannot ease the impact of the restrictions by segregating AID funds in separate accounts, and they are expressly denied the option of using unsubsidized affiliates to continue speech activities in cooperation with American entities.[17]

This Court, while consistently holding that constitutional rights are not infringed by a governmental decision not to subsidize the exercise of those rights, *Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297; *Regan v. Taxation with Representation*, 461 U.S. 540 (1983); *Lyng v. International Union*, 485 U.S. 360, has equally consistently held that normal constitutional standards apply to decisions to condition subsidies on restrictions which, although attached

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17 The restrictions imposed by the Clause thus are far more sweeping even than the restrictions at issue in *Rust v. Sullivan, cert. granted*, 110 S. Ct. 2559. The regulations in *Sullivan* restrict the speech of health care professionals in federally funded family planning projects. As the Solicitor General repeatedly pointed out in arguing *Sullivan*, the government does not claim the right to restrict recipients of those government funds to speak in their separately financed activities (*e.g.*, Brief For The Respondent, pp. 8-9, 21). Here, the restrictions affect every part of an organization, any element of which receives AID funds. The recipient of funds here is not free to speak without restriction in its separate programs.

to government funds, limit "wholly private" conduct.[18] *Regan v. Taxation with Representation*, 461 U.S. 540; *FCC v. League of Women Voters*, 468 U.S. 364 (1984); *Planned Parenthood of Central and Northern Arizona v. Arizona*, 718 F.2d 938 (9th Cir. 1983), *aff'd sub nom., Babbitt v. Planned Parenthood*, 479 U.S. 925 (1986). *Taxation with Representation* and *League of Women Voters* hold that restrictions on speech can only be attached to government funds if the recipient remains free to speak without limit through a separate but controlled entity.[19]

Petitioners do not challenge in this case government's power to limit the use of its money abroad; petitioners challenge only conditioning eligibility for government funding so as to interfere with wholly unsubsidized and constitutionally protected speech activity. Although in this case the terms of the Clause appear to limit only the wholly private speech and association of private foreign organizations, as opposed to

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18 In *Webster*, *Harris*, and *Maher* this Court stressed that the government was only refusing to fund abortion itself, not denying unrelated benefits to women who had abortions that were financed from other sources. *Webster*, 106 L. Ed. 2d at 431 n.8, 109 S. Ct. at 3052 n.8; *Harris*, 448 U.S. at 317 n.19; *Maher*, 432 U.S. at 474 n.8. Similarly, in *Buckley v. Valeo*, 424 U.S. 1, upholding conditions on public funding of election campaigns, this Court pointed out that parties or candidates who did not choose to qualify for public funding remained free to get private financial support, and, indeed, were freed from certain otherwise applicable limits on such support. 424 U.S at 99. In *Lyng*, 485 U.S. 360, this Court, in upholding denial of food stamp benefits to individuals who became eligible because their incomes fell when they went on strike, noted that the statute did not make going on strike a basis for stopping benefits for which a person had earlier qualified on other grounds. *Id.* at 372-73.

19 In *Taxation with Representation*, 461 U.S. 540, this Court held that if government conditions its subsidies on an organization limiting its privately financed speech, the organization must be free to set up a legally separate organization, which it can control, to engage in protected speech without limitation. In *League of Women Voters*, 468 U.S. 364, this Court invalidated a speech-limiting condition precisely because there was no such alternative of speaking through a controlled separate organization. The Clause denies that option, because it specifically imputes the limits on direct grantees to separate foreign private organizations that are controlled by, or control, the direct grantees. A.82a-83a ¶ (d)(11).

the domestic organizations in all of this Court's prior cases, the purposeful impact of the Clause is to directly and substantially limit the speech and association of domestic individuals and organizations such as Planned Parenthood. Therefore the distinction established in this Court's prior cases—between conditions on subsidies based on the use of the subsidies, and conditions on subsidies based on wholly private speech—must be maintained.

The court of appeals' decision, however, obliterates this carefully drawn line of demarcation. The court of appeals' decision treats any condition attached to a subsidy as a "refusal to subsidize." The harm to Planned Parenthood's first amendment rights is dismissed as merely "the result of choices made by foreign NGOs to take AID's money rather than engage in non-AID funded cooperative efforts with [Planned Parenthood]." A.11a. That concept, however, would validate any condition on government funding, without regard to how severely it restricts wholly private activities, or how distinct the private activity is from the government funded activity. By the Second Circuit's formulation, any restriction is valid so long as it is worded as a condition on a subsidy, and not as a direct "prohibition[ ] on speech." A.12a.

C. Under This Court's Decisions, The Exercise Of Foreign Policy Is Not Automatically Immune From Strict Scrutiny.

The court of appeals also argued that it would be "impossible to conduct foreign policy" if the political branches are not free to use American foreign aid not just to promote our government's viewpoint, but also to "encourage[ ] the foreign recipients of American aid not to speak or associate with Americans opposed to that viewpoint." A.13a. The court raised the spectre that any other rule would allow legal challenges by white supremacists to anti-apartheid foreign aid programs, citing 22 U.S.C. 5081, or by opponents of American foreign policy on international terrorism to restrictions

on aid to " 'entities associated with' " the Palestine Liberation Organization, citing 22 U.S.C. 2227. A.13a-14a

The court's approach would amount to a rule that any expenditure of government funds that suppresses the wholly private speech and association of Americans in foreign countries can withstand constitutional challenge if the expenditure of funds is in pursuit of American foreign policy. This approach abdicates the requirement consistently imposed by this Court that, even when the justification for an infringement of Americans' constitutional rights is foreign policy, strict scrutiny is applicable: government must "show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.' " *Boos v. Barry*, 485 U.S. 312, 321 (1988) (quoting *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). *See also Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

Petitioners are entitled to the application of this standard to their claim. Likewise, should American citizens claim that their rights to speak and associate are suppressed by the anti-apartheid or anti-terrorism statutes cited by the court of appeals,[20] upon sufficient allegations they too would be enti-

20 In fact, neither of the two statutory schemes cited—nor any other foreign aid limit of which petitioners are aware—conditions U.S. aid on foreign organizations agreeing to limits that would forbid joint speech with Americans. The anti-apartheid laws ban economic transactions and limit aid based only on conduct, not speech, *e.g.*, 22 U.S.C. § 5036 (no aid to group including individuals found to have engaged in gross violations of human rights); 22 U.S.C. § 5038 ("necklacing"). *See also* 22 U.S.C. § 2151n(e)(2)(A) (aid earmarked for South African NGOs that promote a just society and help victims of apartheid). The anti-PLO statute does not require that any foreigners agree not to engage in pro-Palestinian speech with like-minded Americans. Indeed, both the anti-apartheid and the anti-PLO legislation include provisions designed to protect exchanges of ideas and information, 22 U.S.C. § 5053(c) (publications from South Africa) and § 5202(1) (PLO-provided information). Moreover, the practicality of applying normal constitutional standards to foreign policy actions is illustrated by the upholding of the prohibition in 22 U.S.C. § 5202(3) on representing the PLO, on the basis of a finding that the law did not inhibit the rights of pro-PLO Americans to

tled to the application of this standard. Presumably, in those instances government could demonstrate a compelling state interest sufficient to sustain the statutes.

Here, however the Clause cannot survive "strict scrutiny" because, under this Court's decisions, it must serve a compelling governmental interest unrelated to suppression of ideas, and it must be narrowly drawn. *Boos v. Barry*, 485 U.S. at 321; *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

The government interest served by the Clause, whatever it is, is not unrelated to the suppression of ideas. The Clause, on its face, is concerned with limiting speech—speech with a particular viewpoint—about abortion.

Moreover, as the court of appeals observed in *Planned Parenthood I*, "the [Mexico City] Statement could be implemented in a number of alternative ways without compromising AID's policy, such as contribution to NGO's through segregated accounts." A.48a. Such financial separation would fully serve to "disassociate" AID and the executive branch from abortion related activities of foreign NGO recipients, without treading on petitioners' rights.[21] Indeed, AID

associate with PLO representatives, but only to act as the formal agents of the PLO. *Palestine Information Office v. Shultz*, 853 F.2d 932, 941 (D.C. Cir. 1988).

21 There is a serious question about the government interest served by the Clause. At the time the statement was announced State Department officials made a number of official statements explaining its purpose. None referenced an interest in "disassociation." Instead they spoke of an intent to ensure that U.S. funds were not diverted to support abortion. State Department Cable, Subject: Population: U.S., Population Assistance Policy; "Background Briefing on Administration's Policy on Population, Friday, July 13, 1984, 2:40 P.M." (unedited transcript). A government interest in preventing diversion could easily be served by financial controls without banning all disfavored speech. In any event, petitioners are entitled to a trial to determine the actual government interest served by the Clause. *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, 811-15 (1985); *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977).

has implemented the policy with respect to grants to foreign governmental institutions by requiring only such segregation.

II. The Clause Unconstitutionally Censors Information About Abortion That American Women Overseas May Receive.

In the clinical services setting, the Clause interferes with the right of American women overseas, such as petitioner Doe, to make fully informed choices about contraception and child-bearing without censorship imposed by the American government. This Court has recognized this right not just in the context of reproductive health, *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 772 (1986), but in the area of medical self-determination generally.[22] *Cruzan v. Director, Mo. Dept. of Health*, 110 S. Ct. 2841, 2851-52 (1990); *id.* at 2856 (O'Connor, J., concurring).

No aspect of petitioner Doe's care is subsidized by the United States government; but the Nigerian private hospital upon which she relies merely receives AID funds for family planning projects that are wholly separate from the facilities which the hospital uses for Doe's care. If the hospital is required to agree to the Clause in order to maintain its project's eligibility for AID funding, all of its activities will be subject to the Clause's limits on counseling women as to the availability and benefits of abortion. These are limits that are

22 The relevance of information about abortion to contraceptive choice is illustrated by United States Food and Drug Administration requirements for the intrauterine device (IUD). If pregnancy occurs with an IUD in place and the device cannot be removed, the woman is subject to the serious health risk of septic miscarriage. FDA regulations require that at the time of insertion of the IUD, women be given a pamphlet that instructs them that if they become pregnant with an IUD in place, they should discuss with their physicians whether to continue the pregnancy or abort it. 21 C.F.R. § 801.427(b)(2) (1989). A woman considering a method such as the IUD, therefore, needs to know at the time she chooses a method of contraception whether abortion will be an option available to her if she chooses an IUD and the device fails. If it is not, she may want to choose a different method. The Clause does not allow the provision of this information. Thus, the Clause itself can be the cause of a woman's life being endangered.

inconsistent not only with Nigerian laws,[23] but with accepted principles of medical ethics.[24]

Doe's claim does not involve a government subsidy of her rights. It involves government interfering with her private exercise of her rights by threatening to penalize her health care provider with ineligibility for a subsidy if her health care provider assists her in her exercise of her rights, or indeed provides her with medically ethical care consistent with local law.

This Court has consistently recognized this distinction. Specifically, in *Webster v. Reproductive Health Services* this Court upheld prohibitions on the use of public facilities and public funds for certain abortion services but observed that a different analysis would be required "if the State barred doctors who performed abortions in private facilities from the use of public facilities for any purpose." 106 L. Ed. 2d at 431 n.8, 109 S. Ct. at 3052 n.8. Similarly, in *Harris v. McRae* this Court upheld the government's decision not to fund abortions through the Medicaid program, but cautioned that "[a] substantial constitutional question would arise if Congress had attempted to withhold all Medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy." 448 U.S. at 317 n.19. In *Babbitt v. Planned Parenthood*, 479 U.S. 925, this Court summarily affirmed a ruling that a law which denied government funds to organizations that provided privately funded abortion counseling created an unconstitutional penalty on women's

23 Abortion is legal on broad health grounds, going beyond the narrow exceptions of the Clause, in the part of Nigeria in which Lagos is located. Cook and Dickens, *Issues in Reproductive Health Law in the Commonwealth*, p. 68 (1986). Moreover, nothing in Nigerian law prevents a Nigerian doctor from advising her as to circumstances in which she might, for health reasons, wish to return to the United States to secure a safe, legal abortion.

24 See American Medical Association, "Current Opinions of the Council on Ethical and Judicial Affairs" (1986); American College of Obstetricians and Gynecologists, "Standards For Obstetric Gynecological Service" (1985, 6th ed.)

right to receive information about and have access to abortion.

The court of appeals' conclusion that Doe does not present the situation recognized by these cases is wrong.[25] Doe's situation is precisely the same. *Babbitt*, the situations mentioned in *Harris* and *Webster*, and Doe's complaint here all involve the rights of the woman. In each instance, her right to constitutionally protected, wholly private medical assistance is interfered with because of a penalty imposed by the government (in this case, the withdrawal of eligibility for AID funds) upon her health care provider solely because of the provision of that assistance.

III. The Clause Unconstitutionally Forces American Organizations To Espouse Particular Beliefs.

As applied to Planned Parenthood Federation, the Clause suffers from the additional, and independent, constitutional infirmity that, as alleged in the Complaint, it requires Planned Parenthood Federation to espouse and circulate particular ideas—ideas that it finds repellent.

If all the Clause said was that AID itself would not approve[26] subgrants to foreign organizations that used non-AID funds to conduct advocacy and counseling about abortion with which AID disagrees, the Clause would still be unconstitutional because of its impact on the overseas speech of Americans. In that event, at least it would not force American groups to join with AID in circulating its views. In fact, however, a central element of the Clause is the conscription of AID's domestic grantees, such as Planned Parenthood Federation, in the circulation of a particular set of views on abortion.

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25 The court of appeals stated that the issue would be presented only by an allegation "that Doe's physician may not work at an AID-funded clinic if she or he performs or actively promotes abortion at a facility unrelated to the AID-funded clinic." A.16a.

26 AID's specific approval is required for each foreign project to which a domestic AID grantee proposes to subgrant AID funds.

Under the first amendment this Court has held that government cannot require Americans to recite or display messages containing state-approved ideas with which they disagree as a condition of attending public school or of enjoying a public benefit. *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

Here, the mandated participation of Planned Parenthood Federation in propagating AID's views on abortion is far greater than the actions the government sought to compel in *Barnette* or *Maynard*.[27] As a condition of receiving AID funds, Planned Parenthood Federation must require its foreign nongovernmental subgrantees to accept a definition of "abortion as a method of family planning" that fundamentally differs from its own, it must extract their agreement to refrain from advocating abortion rights in any way, despite Planned Parenthood Federation's commitment to expanding those rights, and it must get them to accept constraints on counseling their clients that violate medical ethics and Planned Parenthood Federation's own standards on the same subject.

The ideological commitments that Planned Parenthood Federation would be forced to elicit from its subgrantees reflect a particular state-prescribed doctrine on the highly controversial subject of abortion.[28] These commitments go beyond how American government funds should be spent. They amount to a loyalty oath on a matter that this Court has recognized to be a private one between a woman and her physician. *Roe v. Wade*, 410 U.S. 113 (1973); *Thornburgh*, 476 U.S. 747; *Cruzan*, 110 S. Ct. 2841.

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27 The protection against coerced speech applies to corporations as well as individuals. *Pacific Gas & Electric Co. v. California Public Utilities Comm'n*, 475 U.S. 1, 16 (1986).

28 *See City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 472 n.16 (1983) (state-prescribed statements about abortion may "violate the First Amendment rights of the physician if the State requires him or her to communicate its ideology") (O'Connor, J., dissenting).

Thus, by signing the Clause, Planned Parenthood Federation would not only be forced to be a chief instrument in strangling its own overseas speech; it would also be forced to circulate and secure adherence to ideas about reproductive rights that it finds repellent, and to be part of an ideological crusade the United States government could not validly conduct at home.

Under this Court's decisions on forced speech, it is irrelevant that compelled propagation of AID's views on abortion is a condition of government funding. Displaying the state-prescribed license tag slogan in *Maynard*, 430 U.S. 705, was also cast as a condition on a governmental benefit—namely, obtaining a license plate to operate a car.

Moreover, it is irrelevant under this Court's decisions that the ideas about abortion that Planned Parenthood Federation would have to circulate are really the views of the United States government rather than its own. In *Pacific Gas and Electric*, 475 U.S. 1, the objectionable message was clearly labeled as that of another group, and in *Maynard* this Court squarely rejected the view, adopted by the dissent, that making drivers display a slogan on their car license plates was not forced speech because "the format of [license plates] is known to all as having been prescribed by the State." 430 U.S. at 721 (Rehnquist, J., dissenting). Rather, the majority correctly viewed the license plate slogan requirement as constitutionally flawed because it forced a citizen "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Id.* at 715.

In the case of AID's Clause, as in those of New Hampshire's slogan, West Virginia's pledge, and California's mail inserts, the unconstitutional coercion of opinion lies not in any risk that others will understand Planned Parenthood Federation actually to believe the ideology the government forces it to circulate, but in the invasion of its right to choose for itself what ideology to circulate.

IV. The Clause Imposes A Restriction Considered And Rejected By Congress.

The legislative history of the international family planning program shows that Congress has spoken directly to the issue addressed in the Clause. Congress considered the spectrum of possible restrictions on AID funds concerning abortion performance or motivation, and settled on a point on that spectrum as the proper level of restriction. That point is to forbid the use of *AID funds* to perform abortion or to promote voluntary abortion. Congress has stated that the restrictions it has established "effectively set necessary limits." H.R. Conf. Rep. No. 413, 97th Cong. 1st Sess 68 (1981).

This Court has firmly and consistently ruled that "[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929). *See also National Passenger Railroad Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974). This rule has been enunciated in the most profound of national debates over the powers of Congress and the executive:

> It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem, as Congress did to that of seizure, to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring), and in a wide array of challenges to executive actions. *See, e.g., American Methyl v. Environmental Protection Agency*, 749 F.2d 826 (D.C. Cir. 1984) (provision of a particular enforcement remedy prevents inference of agency authority for a different remedy).

Even in the foreign affairs context, this Court has also admonished that "[i]f Congress has directly spoken to the

precise issue in question, if the intent of Congress is clear, that is the end of the matter." *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 233 (1986) (citing *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984)).

Congress has spoken directly to the issue here. Therefore, the executive is not now free to extend the limit set by Congress further on the spectrum to encompass restrictions rejected by Congress.

In 1973 Congress debated the question of what limits to impose upon AID grantees relative to their provision of abortion services, and adopted a provision that has come to be known as the "Helms Amendment." The Helms Amendment states that no AID funds may be used "to pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions." Pub. L. No. 93-189, 22 U.S.C. § 2151b(f).

When Senator Helms proposed his amendment, he pointed out that Congress could go further by requiring that all abortion activities, however financed, be stopped as a condition of U.S. assistance.[29] After the conference committee, when the legislation returned to the floor, the limited nature of the restrictions Congress chose to impose on recipients of AID funds was reaffirmed in both Houses. Senator Case, who was a member of the conference committee, noted that the Helms Amendment was intended only to limit the uses of AID funds, and:

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29 It [the amendment] is intended to prevent the use of AID funds—that is to say, funds collected from the taxpayers of the United States—in the practice and promotion of abortion.

It requires only that U.S. Government funds made available for legitimate purposes not be commingled with funds from other sources that might be used for abortion.

We could, in fact, go far beyond the present amendment and require all abortion activities, from whatever funds, to be stopped before our assistance could be received. But the present amendment does not do that.

119 Cong. Rec. 32292-93 (October 1, 1973).

should not be construed as an attempt to dictate medical procedures to individual women in developing countries or to medical practitioners following the prevailing local customs and medical practice or to foreign governments. That is a matter . . . wholly beyond congressional authority and rightly so. Similarly [it] does not affect the policies and programs of international agencies that respond to local requests and circumstances.

119 Cong. Rec. 39619 (December 5, 1973).

This history shows that when Congress legislated a solution to the question of limitations to be imposed upon the abortion related activities of AID grantees, it chose only to restrict the use of the AID funds, and it explicitly chose not to restrict grantee activities funded by sources other than AID. Additionally, when Congress chose not to place limits on the use of grantees' private funds—so as not to dictate medical procedures to women or medical practitioners in other countries—it strengthened the overarching congressional policy expressed in 22 U.S.C. § 2151u(a) not to interfere with the "independent nature" of private grantees.[30]

Periodically, between 1973 and 1984, Congress returned to this issue. Each instance resulted in a restatement of the original policy decision: that the use of AID funds should be limited, but that activities of recipient organizations which are not financed with AID funds should not be limited. For example, in 1981 Congress amended the Helms Amendment to forbid the use of U.S. funds for biomedical research relating to abortion or involuntary sterilization as methods of family planning (Pub. L. No. 97-113, 22 U.S.C. § 2151b(f)(3)). The Conference Committee Report accompanying this amendment stated:

> [T]he existing prohibition on the use of AID population planning funds for services to perform abortion as a method of family planning, and the new additional prohibition on biomedical research on abortion as a method of family planning, *effectively set necessary limits on*

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30 The Clause is visibly inconsistent with, and indeed undermines, that policy. Thus, it cannot be upheld. *Morton v. Ruiz*, 415 U.S. 199, 237 (1974).

U.S. support for international population planning programs with respect to concerns about adequate directives against promotion of abortion-related activities.

H.R. Conf. Rep. No. 413, 97th Cong. 1st Sess. 68 (1981) (emphasis added). *See also* the debate over the International Development and Food Assistance Act of 1977. 123 Cong. Rec. 24370 (July 21, 1977) (Statement of Rep. Zablocki, a member of the conference committee for that Act, and the Chairman of the House International Relations Committee).[31]

The court of appeals acknowledged that Congress was aware that it could legislate a limit on non-federal funds. The court of appeals concluded, however, "that the Congress . . . never addressed the issue of limitations on non-federal funds" because Congress did not affirmatively reject such a limit at the time it voted to impose the limit on federal funds. A.45a.

This Court's decisions do not require, as suggested by the court of appeals, an affirmative vote rejecting a disputed limitation where, as here, it is clear that in adopting a different limitation, Congress considered and chose not to adopt the limitation in dispute. *See* p. 25, *supra*.

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31 Since the announcement of the Mexico City Statement, Congress has considered legislation to ratify and legislation to nullify the Clause. It has enacted neither. This failure to act leaves this issue to be resolved on the basis of original congressional intent. *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

DATED: January 17, 1991

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1524—August Term, 1989

(Argued June 7, 1990 Decided September 19, 1990)

Docket No. 90-7274

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.; PLANNED PARENTHOOD CENTER OF EL PASO; STEWART R. MOTT; STEPHEN L. ISAACS; SOSAMMA LINDSAY, on behalf of herself and others similarly situated; and JANE DOE, on behalf of herself and others similarly situated,

Plaintiffs-Appellants,

—against—

AGENCY FOR INTERNATIONAL DEVELOPMENT and M. PETER MCPHERSON, as Administrator of the Agency for International Development,

Defendants-Appellees.

Before:

VAN GRAAFEILAND, MINER and ALTIMARI,
Circuit Judges.

Appeal from judgment of United States District Court for the Southern District of New York (Walker, *C.J.*, sitting by designation) dismissing, for failure to state a claim, complaint alleging that conditions for federal assistance to foreign nongovernmental family planning organizations violate plaintiffs' speech and privacy rights.

Affirmed.

ROGER K. EVANS, New York, N.Y. (Eve W. Paul, Dara Klassel, Planned Parenthood Federation of America, New York, N.Y., Walter B. Slocombe, Albert G. Lauber, Jr., Caplin & Drysdale, Chartered, Washington, D.C., Harriet F. Pilpel, New York, N.Y., of counsel), *for Plaintiffs-Appellants*.

STACEY J. MORITZ, Assistant United States Attorney, New York, N.Y. (Otto G. Obermaier, United States Attorney for the Southern District of New York, Edward T. Ferguson, III, Assistant United States Attorney, New York, N.Y., of counsel), *for Defendants-Appellees*.

James F. Fitzpatrick, New York, N.Y. (Margaret T. Burns, Gwyn F. Murray, Arnold & Porter, Washington, D.C., of counsel), *filed a brief for amici curiae Association for Voluntary Surgical Contraception, Family Health International, Alan Guttmacher Institute, International Projects Assistance Services, International Women's Health Coalition, Pathfinder Fund, Population Council and Population Crisis Committee.*

Norman Siegel, New York, N.Y. (Arthur Eisenberg, Catherine Weiss, New York Civil Liberties Union, New York, N.Y., of counsel), Rachael Pine, New York, N.Y. (Ellen K. Goetz, American Civil Liberties Union, New York, N.Y., of counsel), *filed a brief for amici curiae American Civil Liberties Union, New York Civil Liberties Union, Fund for Free Expression, Professional Rights Committee of American Society of Journalists and Authors, Inc. and P.E.N. American Center.*

MINER, *Circuit Judge*:

Plaintiffs-appellants Planned Parenthood Federation of America, Inc. ("Planned Parenthood"), Planned Parenthood Center of El Paso, Stewart R. Mott, Stephen L. Isaacs, Sosamma Lindsay and Jane Doe appeal from a judgment entered in the United States District Court for the Southern District of New York (Walker, *C.J.*, sitting by designation) dismissing the complaint in this action for failure to state a claim upon which relief may be granted. *See Planned Parenthood Fed'n of Am., Inc. v. Agency for Int'l Dev.*, No. 87

Civ. 0248 (JMW) (S.D.N.Y. Mar. 7, 1990) (1990 WL 26306; 1990 U.S. Dist. LEXIS 2430). Plaintiffs-appellants contend that the implementation of an executive branch policy by the Agency for International Development ("AID") restricting federal assistance to foreign nongovernmental family planning organizations violates their constitutional rights to speech, association and privacy. The district court, considering the claims on remand from our decision in *Planned Parenthood Fed'n of Am., Inc. v. Agency for Int'l Dev.*, 838 F.2d 649 (2d Cir. 1988) (*Planned Parenthood I*), upheld AID's conditions on funding for foreign nongovernmental organizations as the least restrictive means of implementing a nonjusticiable foreign policy decision. For the reasons that follow, we affirm.

BACKGROUND

Familiarity with our decision in *Planned Parenthood I* is presumed, and we restate only those facts relevant to this appeal.

The Foreign Assistance Act of 1961, 22 U.S.C. §§ 2151-2429a-1 (1988), authorizes the President "to furnish assistance, on such terms and conditions as he may determine, for voluntary population planning." 22 U.S.C. § 2151b(b). The President's policy concerning such assistance was announced in an August 1984 statement at a United Nations conference on population planning in Mexico City. The statement provides in pertinent part:

> [T]he United States does not consider abortion an acceptable element of family planning programs and will no longer contribute to those of which it is a part. Accordingly, when dealing with nations which support abortion with funds not provided by the United States Government, the United States will contribute to such nations through segregated accounts which cannot be used for abortion. Moreover, the United States will no longer contribute to separate nongovernmental organizations which perform or actively promote abortion as a method of family planning in other nations.

Policy Statement of the United States of America at the United Nations International Conference on Population (Second Session) Mexico, D. F., August 6-13, 1984, at 4-5 (hereafter the "Mexico City Statement"). Thus, the United States policy is to continue to fund foreign governments through segregated accounts that may not be used for abortion-related activity, even if the foreign government engages in such activity with its own funds, but to "withhold federal assistance from foreign nongovernmental organizations ("NGOs") that perform or actively promote abortions, even if those activities are financed with non-federal funds." *Planned Parenthood I*, 838 F.2d at 651.

Administration of the voluntary population planning program has been delegated by the President to the Director of the United States International Development and Cooperation Agency, Exec. Order No. 12,163, 44 Fed. Reg. 56,673 (1979), who has further delegated that authority to the Administrator of the Agency for International Development, IDCA Delegation No. 1, 44 Fed. Reg. 57,521 (1979), *as amended*, 45 Fed. Reg. 74,090 (1980). *See Planned Parenthood I*, 838 F.2d at 651. AID disburses federal family planning assistance through cooperative agreements with domestic NGOs such as

Planned Parenthood. Planned Parenthood and other domestic NGOs, in turn, subgrant AID funds to foreign NGOs for family planning projects in foreign countries.

In response to the Mexico City Statement, AID drafted a "Standard Provision to be Used in Grants and Cooperative Agreements with U.S. Nongovernmental Organizations" (the "Standard Clause") containing eligibility provisions for family planning grants and cooperative agreements. Every foreign NGO receiving assistance for family planning from AID must "certif[y] in writing that it does not perform or actively promote abortion as a method of family planning in AID-recipient countries and does not provide financial support to any other foreign nongovernmental organization that conducts such activities." Standard Clause ¶ (d)(3)(i). The phrase "actively promote abortion" is defined in the Standard Clause to include "providing advice and information regarding the benefits and availability of abortion," "encouraging women to consider abortion," and "[l]obbying a foreign government to legalize or make available abortion." *Id.* ¶ (d)(10)(iii). These restrictions on abortion-related activities apply to the entire organization, not just to the project or division of the foreign NGO receiving AID funds. *Id.* ¶ (d)(11).

AID has informed Planned Parenthood that, upon expiration of a temporary agreement on October 31, 1990, it will not renew the former cooperative agreement unless Planned Parenthood agrees to enforce the Standard Clause when subgranting funds to foreign NGOs. However, no restriction is placed on the use of non-AID funds by Planned Parenthood in the United States or abroad; Planned Parenthood remains free to expend its

own funds for abortion-related activities while participating as a conduit for AID funds to foreign NGOs. *See id.* ¶ (c). A foreign NGO also may employ or collaborate with other individuals and organizations on all family planning projects except abortion-related activities while, at the same time, its employees and collaborators independently engage in abortion-related activities, provided that the NGO does not endorse or provide financial support for the action and takes reasonable steps to ensure that the employee or collaborator does not improperly represent that they are acting on behalf of the NGO. *Id.* ¶ (d)(10)(iii)(C).

Plaintiffs-appellants allege that the Standard Clause violates their constitutional rights to speech, association and privacy.[1] Planned Parenthood contends that the Standard Clause imposes unconstitutional conditions on an important government benefit by requiring it to enforce restrictions on speech in order to participate as a conduit for AID funds to foreign NGOs. Together with plaintiffs-appellants Planned Parenthood Center of El Paso, Stewart R. Mott and Stephen L. Isaacs, Planned Parenthood also contends that the Standard Clause interferes with free speech and association by providing a financial incentive for foreign NGOs to abstain from participating with them in abortion-related activities.

Plaintiff-appellant Sosamma Lindsay, an American citizen and Dean of a nursing college in Kenya, sues individually and as representative of a class of American

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1 Plaintiffs-appellants also alleged that the Standard Clause was adopted in violation of AID's statutory authority. The district court dismissed the statutory claims, *Planned Parenthood Fed'n of Am., Inc. v. Agency for Int'l Dev.*, 670 F. Supp. 538, 542-45 (S.D.N.Y. 1987), and we affirmed the dismissal of those claims in *Planned Parenthood I*, 838 F.2d at 654-55.

citizens employed by foreign NGOs subject to the terms and conditions of the Standard Clause. She contends that the foreign university for which she works would be required by the Standard Clause to prevent her from teaching a curriculum relating to the availability and benefits of abortion and that her first amendment right to speak out on family planning issues would be restricted accordingly.

Plaintiff-appellant Jane Doe, an American citizen who lives in Nigeria, sues individually and as representative of a class of women who rely for family planning advice on foreign NGOs subject to the terms and conditions of the Standard Clause. She contends that the Standard Clause prevents her and others similarly situated from receiving "full and accurate medical information and advice about family planning and abortion" from foreign NGOs that receive funding from AID.

The district court initially dismissed the constitutional challenges to the Standard Clause as nonjusticiable because they were "targeted not merely at a method or means of implementation of a foreign policy, but at the foreign policy itself." *Planned Parenthood*, 670 F. Supp. at 547. In *Planned Parenthood I*, we agreed that the policy itself was not justiciable, but we reversed and directed the district court to consider on remand " 'the legality of AID's implementation of the [Statement].' " 838 F.2d at 656 (quoting *DKT Memorial Fund, Ltd. v. Agency for Int'l Dev.*, 810 F.2d 1236, 1238 (D.C. Cir. 1987)).

Complying with that directive, the district court examined the Standard Clause, determined that AID has chosen the least restrictive means to implement an otherwise unreviewable policy, and dismissed the complaint.

Planned Parenthood, 1990 WL 26306 at *7, 1990 U.S. Dist. LEXIS 2430 at *20. The district court applied the deferential standard of review described in *United States v. O'Brien*, 391 U.S. 367 (1968), because it found that any impact on plaintiffs' speech was incidental to the restrictions on foreign NGOs mandated by the foreign policy identified in the first appeal. The court held that AID's implementing mechanism, the Standard Clause, (1) was "within the statutory and constitutional power of the government"; (2) "advance[d] a substantial governmental foreign policy interest"; and (3) that the "incidental intrusion on the rights of domestic NGOs is 'no greater than is essential to the furtherance of the [government's] interest.' " *Planned Parenthood*, 1990 WL 26306 at *8, 1990 U.S. Dist. LEXIS 2430 at *24 (quoting *O'Brien*, 391 U.S. at 377). The court found that the direct, viewpoint-based restrictions on foreign NGOs did not preclude application of the *O'Brien* test because "[t]he government may, as a matter of its foreign policy choices, discriminate on the basis of its political views in deciding which foreign governments and NGOs will further United States interests and one vehicle it may employ in doing so is its power to grant foreign assistance." *Id.*, 1990 WL 26306 at *6, 1990 U.S. Dist. LEXIS 2430 at *18. The court also dismissed Doe's privacy claim, finding that the Standard Clause was not an " 'affirmative legal obstacle to abortion services' " and that its " 'practical effect . . . on the availability of abortion services is constitutionally irrelevant.' " *Id.*, 1990 WL 26306 at *8, 1990 U.S. Dist. LEXIS 2430 at *25 (quoting *New York v. Sullivan*, 889 F.2d 401, 411 (2d Cir. 1989), *cert. granted*, 110 S. Ct. 2559 (1990)).

DISCUSSION

The government's "decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Regan v. Taxation With Representation*, 461 U.S. 540, 549 (1983). The government may deny food stamps to a household because one of its members is participating in a labor strike, *Lyng v. International Union, United Auto. Workers*, 485 U.S. 360 (1988); it may deny tax-exempt status to an organization because it engages in lobbying, *Taxation With Representation*, 461 U.S. 540; it may provide public funding to some candidates for public office and deny such funding to others, *Buckley v. Valeo*, 424 U.S. 1, 90-107 (1976) (per curiam); and it may deny tax deductions for amounts expended for the promotion or defeat of legislation and initiative measures, *Cammarano v. United States*, 358 U.S. 498 (1959). The Supreme Court has also held that the government may decide to fund only medical expenses incident to childbirth and not any expenses related to abortion. *Harris v. McRae*, 448 U.S. 297, 315 (1980); *Maher v. Roe*, 432 U.S. 464, 474 (1977). A policy of not subsidizing the exercise of a fundamental right differs in an important respect from a prohibition on the exercise of a fundamental right, *see, e.g., Boos v. Barry*, 485 U.S. 312 (1988), or from the imposition of an unconstitutional condition on the exercise of a fundamental right, *see, e.g., Perry v. Sindermann*, 408 U.S. 593 (1972), because the mere refusal to subsidize a fundamental right "places no governmental obstacle in the path" of a plaintiff seeking to exercise that right, *McRae*, 448 U.S. at 315; *see also Taxation With Representation*, 461 U.S. at 549-50; *Buckley*, 424 U.S. at 94-95.

Plaintiffs-appellants contend that the Standard Clause places obstacles in the path of their exercise of first amendment rights and therefore must be subjected to strict scrutiny. They allege that it is impractical for United States citizens or organizations to engage in abortion-related activities abroad without the cooperation of foreign organizations and that the Standard Clause deters "many of the most logical and effective foreign partners." By conditioning AID funding of foreign NGOs on complete disassociation with abortion-related activities, they contend AID "picks off or buys up" foreign NGOs that otherwise would participate with plaintiffs-appellants in abortion-related activities. *See DKT Memorial Fund Ltd. v. AID*, 887 F.2d 275, 300 (D.C. Cir. 1989) (Ginsburg, R., J., dissenting). However, unlike statutes imposing criminal penalties for those who burn the American flag, *see United States v. Eichman*, 110 S. Ct. 2404 (1990), or prohibiting the display of certain signs in front of embassies, *see Boos v. Barry*, 485 U.S. 312 (1988), the Standard Clause does not prohibit plaintiffs-appellants from exercising their first amendment rights. Plaintiffs-appellants may use their own funds to pursue whatever abortion-related activities they wish in foreign countries. Indeed, the Standard Clause permits Planned Parenthood to grant AID funds to a foreign NGO for all aspects of family planning except abortion and to use its own funds to establish an abortion-related facility next door. The harm alleged in the complaint is the result of choices made by foreign NGOs to take AID's money rather than engage in non-AID funded cooperative efforts with plaintiffs-appellants.

Such an incidental effect from the refusal to subsidize the exercise of a constitutional right obviously is not what the Supreme Court considers an "obstacle in the path" of plaintiffs seeking to exercise the right. The Court upheld the refusal to subsidize striking workers with food stamps in *Lyng v. International Union*, even though "[d]enying such benefits makes it harder for strikers to maintain themselves and their families during the strike and exerts pressure on them to abandon their union." 485 U.S. at 368. In *McRae*, the Court upheld the government's refusal to subsidize abortion-related medical expenses, despite its finding that the policy "of unequal subsidization of abortion and other medical services [ ] encourages alternative activity deemed in the public interest." 448 U.S. at 315; *see also Maher*, 432 U.S. at 474 (recognizing that refusal to subsidize abortion-related expenses "may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions"). The effect of the Standard Clause on plaintiffs-appellants simply is not comparable to the prohibitions on speech in *Boos* and *Eichman*, the prior restraint of the Pentagon Papers in *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam), or the censorship by means of intimidation and threats of criminal prosecution in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 (1963). Plaintiffs-appellants' reliance on these cases is therefore without merit.

Planned Parenthood's assertion that the Standard Clause imposes an unconstitutional condition on the receipt of an important government benefit, *see, e.g.*, *Sindermann*, 408 U.S. at 597, must fail for similar reasons. In *Sindermann*, the plaintiff was forced to choose between his employment and his right to freedom of speech. *See id.* at 598. No such choice is imposed upon

Planned Parenthood here. Planned Parenthood may continue to participate as a conduit for AID funds that are restricted to non-abortion activities while maintaining with its own funds abortion-related activities in the same countries. Similarly, the Standard Clause does not prevent Planned Parenthood Center of El Paso, Stewart R. Mott, Stephen L. Isaacs, or the class represented by Sosamma Lindsay from pursuing abortion-related activities abroad with non-AID funds.

The voluntary population planning program at issue in this case provides a government subsidy for foreign family planning programs. The President, acting pursuant to his authority under the Foreign Assistance Act, has determined that the government will not subsidize "separate nongovernmental organizations which perform or actively promote abortion as a method of family planning in other nations." Mexico City Statement at 5. As we held in *Planned Parenthood I*, 838 F.2d at 655, the wisdom of, and motivation behind, this policy are not justiciable issues. *See also Buckley*, 424 U.S. at 91; *DKT Memorial Fund*, 810 F.2d at 1238. Were the courts to allow challenges to foreign aid programs on the ground that the government's subsidy of a particular viewpoint abroad encourages the foreign recipients of American aid not to speak or associate with Americans opposed to that viewpoint, the political branches would find it impossible to conduct foreign policy. A holding in favor of plaintiffs-appellants in this case would open the possibility of attacks by white supremacists on the policy of the United States with respect to ending apartheid, *see* 22 U.S.C. §§ 5001-5117, a policy that involves not merely financial incentives for a particular viewpoint but coercive sanctions, *see, e.g.*, 22 U.S.C. § 5081. Opponents of American foreign policy pertaining to

international terrorism could contest restrictions on aid to "entities associated with" the Palestinian Liberation Organization, *see* 22 U.S.C. § 2227. Plaintiffs-appellants have not proposed any means of distinguishing between the Mexico City Statement and these other policies directed at non-citizens that have an incidental impact on the first amendment rights of citizens.

AID's implementation of the executive branch's decision to restrict the class of foreign beneficiaries of American assistance must be upheld if rationally related to the policy goal. *See, e.g., International Union*, 485 U.S. at 365-66; *Taxation With Representation*, 461 U.S. at 548. The district court found that the Standard Clause is narrowly tailored and does not diverge from what is required by the Mexico City Statement. *Planned Parenthood*, 1990 WL 26306 at *7, 1990 U.S. Dist. LEXIS 2430 at *20. Plaintiffs-appellants contend that AID could authorize the use of segregated accounts to allow foreign NGOs to accept restricted funds from AID while expending their own funds for abortion-related activities. While segregated accounts would be less restrictive than the Standard Clause, such accounts would not advance the policy that the United States will "withhold federal assistance from foreign nongovernmental organizations ("NGOs") that perform or actively promote abortions, *even if those activities are financed with non-federal funds*." *Planned Parenthood I*, 838 F.2d at 651 (emphasis added); *see also* Mexico City Statement at 5. Plaintiffs-appellants do not suggest any manner of limiting AID's implementation that is consistent with the policy enunciated in the Mexico City Statement. The Standard Clause goes no further than necessary to implement an otherwise nonjusticiable decision limiting the class of beneficiaries of foreign aid,

and any burden on plaintiffs-appellants rights is incidental to that policy decision. We therefore affirm the dismissal of plaintiffs-appellants' first amendment claims.

As to the privacy claim asserted by plaintiff-appellant Doe, the district court repeated the analysis applied to the first amendment claims and found that the Standard Clause erected no affirmative obstacles to Doe's ability to obtain abortion-related advice. *Planned Parenthood*, 1990 WL 26306 at *8-9, 1990 U.S. Dist. LEXIS 2430 at *25-26. Doe contends that this holding is inconsistent with dicta in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3052 n.8 (1989), and *New York v. Sullivan*, 889 F.2d at 413-14. In *Reproductive Health*, the Court upheld prohibitions on, *inter alia*, the use of public facilities for abortions not necessary to save the mother's life and the use of public funds, employees or facilities for the purpose of encouraging or counseling abortion when not necessary to save the mother's life. 109 S. Ct. at 3042-43. But the Court questioned whether a different result would be required "if the State barred doctors who performed abortions in private facilities from the use of public facilities for any purpose." *Id.* at 3052 n.8; *accord New York v. Sullivan*, 889 F.2d at 413-14. The Court cited *McRae* for this cautionary note, in which it had suggested, also in dicta, that a legitimate refusal to subsidize abortions might be transformed into an unconstitutional penalty "if Congress had attempted to withhold all Medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy by abortion." 448 U.S. at 317 n.19.

The district court properly found that the Standard Clause imposes no such "penalty." There is no allega-

tion in the complaint that Doe will lose her ability to go to an AID funded clinic if she "exercise[s] her constitutionally protected freedom to terminate her pregnancy by abortion" at a facility unrelated to the clinic. *Id.* Nor is there any allegation in the complaint that Doe's physician may not work at an AID-funded clinic if she or he performs or actively promotes abortion at a facility unrelated to the AID-funded clinic. Indeed, the Standard Clause specifically exempts such independent acts from its conditions:

> Action by an individual acting in the individual's capacity shall not be attributed to an [NGO] with which the individual is associated, provided that the [NGO] neither endorses nor provides financial support for the action and takes reasonable steps to ensure that the individual does not improperly represent that the individual is acting on behalf of the [NGO].

Standard Clause ¶ (d)(10)(iii)(C). Because the Standard Clause does not implicate the questions left unanswered in *Reproductive Health*, *McRae*, and *New York v. Sullivan*, we also leave the issue for another day.

Having found no constitutional rights implicated here, we do not address the government's arguments concerning standing. *See Intercommunity Center for Justice and Peace v. INS*, No. 89-6260, slip op. 5747, 5756 (2d Cir. July 27, 1990).

CONCLUSION

The judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

87 Civ. 0248 (JMW)

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.; PLANNED PARENTHOOD CENTER OF EL PASO; STEWART R. MOTT; STEPHEN L. ISAACS; SOSAMMA LINDSAY, on behalf of herself and others similarly situated; and JANE DOE, on behalf of herself and others similarly situated,

Plaintiffs,

—against—

AGENCY FOR INTERNATIONAL DEVELOPMENT and MARK L. EDELMAN, as Acting Administrator of the Agency for International Development,

Defendants.

Opinion and Order

WALKER, Circuit Judge[1]:

Plaintiffs Planned Parenthood Federation of America ("Planned Parenthood") and Planned Parenthood Center of El Paso ("PPCEP"), Stewart R. Mott ("Mott"), Stephen Isaacs ("Isaacs"), and Sosamma Lindsay ("Lindsay") and Jane Doe ("Doe") on behalf of themselves and others similarly situated have brought this action seeking a declaration that certain abortion-related executive restrictions on the use of population planning funds granted by the Agency for International Development ("AID") violate their first amendment speech and associational rights. In addition, plaintiffs Doe and Lindsay seek class certification, and Rachel Roe and Florida Rodrigues seek to intervene as named plaintiffs in these classes. Defendants AID and Peter McPherson as

1 Sitting by designation.

administrator have moved to dismiss the complaint for failure to state a claim upon which relief may be granted pursuant to Fed. R. Civ. P. 12b(6). For the reasons set forth below, the Court grants defendants' motion.

I. *BACKGROUND*

A. *Statutory Background*

The Foreign Assistance Act of 1961, 22 U.S.C. § 2151 *et seq.*, authorizes foreign assistance for, *inter alia*, voluntary population planning "in order to increase the opportunities and motivation for family planning and to reduce the rate of population growth." 22 U.S.C. § 2151b(b). The Act grants the President the authority to "furnish assistance, on such terms and conditions as he may determine, for voluntary population planning." 22 U.S.C. § 2151b(b). Congress placed a single restriction on the President's discretion—such funds may not be used to pay for abortions or involuntary sterilizations as a method of family planning, to motivate or coerce or provide any financial incentive to any person to undergo sterilizations, or for any biomedical research relating to abortion or involuntary sterilization as a means of family planning. 22 U.S.C. § 2151b(f).

The President has delegated his authority to allocate family planning funds under 22 U.S.C. § 2151b(b) to the Director of the United States International Development and Cooperation Agency. Executive Order No. 12,163, 44 Fed. Reg. 56,673 (1979). The Director has, in turn, delegated that authority to the Administrator of AID. AID provides funds through family planning grants and cooperative agreements to international agencies, foreign governments and both foreign and domestic nongovernmental organizations ("NGOs"). An AID grantee, whether foreign or domestic, may then subgrant the funds it receives from AID. AID evaluates and passes upon applications for funds under a variety of criteria, many of which are set forth in a document known as "AID Handbook 13 (Grants)." This document contains a number of standard provisions for insertion into population

planning grants and cooperative agreements with NGOs, including the provisions that plaintiffs challenge here.

In 1984, President Reagan announced certain abortion-related policy limitations on the use of family planning foreign aid funds that went further than the fund limitation set forth in 22 U.S.C. § 2151b(f). The Reagan Administration presented these new limitations at the United Nations sponsored International Conference on Population in Mexico City in August, 1984. The restrictions, which became known as the "Mexico City Policy", and will be referred to as such herein, provide that the United States will withhold federal assistance from foreign NGOs that perform or actively promote abortion in any manner, even if those activities are financed with private funds. The Mexico City Policy states in relevant part:

> [T]he United States does not consider abortion an acceptable element of family planning programs and will no longer contribute to those of which it is a part. Accordingly, when dealing with nations which support abortion with funds not provided by the United States Government, the United States will contribute to such nations through segregated accounts which cannot be used for abortion. Moreover, the United States will no longer contribute to separate nongovernmental organizations which perform or actively promote abortion as a method of family planning in other nations. . .

Def's Mem. at 5.

The Mexico City Policy statement directs federal agencies to implement this new policy. Accordingly, AID adopted new eligibility provisions for both foreign and domestic NGOs to be incorporated in the grants and cooperative agreements that AID requires its grantees to sign as a condition of receiving funding. These provisions, termed by the parties herein "The Standard Clause," require every foreign NGO that receives federal family planning funds to certify in writing that "it will not, while receiving assistance under the grant, perform or actively promote abortion as a method of family planning in AID-recipient countries or provide financial support to

other foreign nongovernmental organizations that conduct such activities." AID Handbook 13, effective June 19, 1987 at 4C-49. The restrictions of the Standard Clause extend to all activities of the foreign NGO, not just projects using AID funds.

Domestic NGOs that receive federal family planning grants from AID, such as Planned Parenthood, must submit to other, less restrictive requirements. They may not use AID, or other federally sourced funds to perform or promote abortion as a method of family planning, but they may use other non-federal funds for such purposes. However, they must agree, as a condition of receipt, that they "will not furnish assistance for family planning under this grant to any foreign nongovernmental organization which performs or actively promotes abortion as a method of family planning in AID-recipient countries or which provides financial support to any other foreign nongovernmental organizations which conduct such activities." AID Handbook 13 at 4C-48. Thus, domestic NGOs, such as Planned Parenthood, may neither use AID funds to perform or promote abortion as a method of family planning, nor may they subgrant such funds to foreign NGOs that perform or actively promote abortions however funded.[2] Neither the Standard Clause nor the Mexico City Policy imposes any restriction on the use which domestic NGOs may make of their own funds, or on the eligibility for AID funding of domestic NGOs that support foreign NGO abortion activity with their own funds. However, the foreign NGO engaged in such activity will necessarily not be funded in any respect by AID.

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2 The requirement that United States grantees impose the restrictions of the Standard Clause on their foreign NGO subgrantees has been enforced against all U.S. entities that receive general AID family planning funds. Complaint at ¶ 43. But for the filing of this action and subsequent arrangements for continued AID funding pending its resolution, AID would have enforced the restrictions against Planned Parenthood in connection with the renewal of a Planned Parenthood grant in 1988. Complaint at ¶ 51. After plaintiffs filed a motion for a preliminary injunction, AID agreed not to require Planned Parenthood to agree to the Clause and to extend the existing Cooperative Agreement between AID and Planned Parenthood pending resolution of the litigation.

B. *The Present Action*

On January 13, 1987, plaintiffs filed an action in this Court challenging both the statutory authority for, and the constitutionality of AID'S implementation of the Mexico City Policy. Plaintiffs seek a declaration that the Clause's funding restrictions impermissibly infringe their first amendment rights to speak about and advocate the availability and benefits of abortion and to associate for purposes of such speech and advocacy with foreign individuals and entities. Plaintiffs also seek an injunction against further imposition of the strictures of the Standard Clause as a condition of receiving AID family planning funds.

Plaintiffs in this action are:[3]

(1) *Planned Parenthood Federation of America*, a provider of both AID and non-AID family planning funds to foreign NGOs whose formal program objectives include "assist[ing] selected organizations in developing countries to increase access to voluntary fertility regulation services, including legal abortion, through information and education, provision of medical services, commodity distribution and lobbying." Planned Parenthood is a major recipient of AID funding and an prominent actor in family planning activities worldwide. In 1986, for example, Planned Parenthood's international division, Family Planning International Assistance ("FPIA"), received $17.7 million in AID funds, from which it made grants to private NGOs which, in turn, provided services to 1.4 million patients. Complaint at ¶ 16.

(2) *Planned Parenthood Center of El Paso*, a Planned Parenthood affiliate, provides family planning and counseling services to El Paso County, Texas and has a "longstanding concern about the access to safe and legal voluntary fertility regulation services, including abortion, in developing countries, especially Mexico." Complaint at ¶ 17.

(3) *Mott*, a regular contributor to Planned Parenthood's international advocacy programs who allegedly intends the

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3 The Court notes that plaintiff Rebecca Ramos voluntarily dismissed her claim in this action on July 13, 1989.

funds he donates to be used by Planned Parenthood in association with foreign organizations to address his concerns about international family planning and the availability of safe and legal abortion to women in all countries. Mott alleges his freedom to engage in advocacy on such family planning issues by means of contributions to PPFA or to its foreign NGO grantees will be restricted because the Mexico City Policy compels Planned Parenthood and other recipients of AID funds to obtain agreements from a "large class of the most logical and effective advocacy partners overseas not to engage in the advocacy he seeks to support." Complaint at ¶¶ 75-79.

(4) *Isaacs*, the Director of the Development Law and Policy Program at Columbia University's Center for Population and Family Health, a clearinghouse for family planning information in less developed countries. Isaacs is engaged in the preparation of a worldwide analysis of laws and practices related to abortion. He alleges that his freedom to speak on international family planning issues by associating with foreign NGOs in advocacy, analysis, and training programs concerning abortion rights in their countries will be restricted because the Mexico City Policy compels Planned Parenthood and other AID recipients to obtain agreements from a large group of Isaacs' most logical and effective advocacy and training partners overseas not to engage in the activities in which he seeks to engage. Complaint at ¶¶ 69-74.

(5) *Lindsay* a citizen of the United States who is Dean of the University of East Africa's College of Nursing in Kenya. Lindsay is now developing a nursing curriculum in which she will teach the role and responsibility of the nurse in advising, counseling and supporting a patient confronted by an unwanted pregnancy. The University, although not its College of Nursing, receives AID funds for family planning. Lindsay alleges that as a result of the Mexico City Policy, the University would be required to restrict Lindsay's freedom to speak in accordance with her personal views and the ethics of the nursing profession. Accordingly, Lindsay's right to develop and teach her nursing curriculum in an educationally

and medically responsible manner will be infringed. Complaint at ¶¶ 59-63, 89.

(6) *Doe*, a citizen of the United States who is a patient of the First Foundation Medical Center in Lagos, Nigeria which receives AID family planning funds through a subgrant. She relies on physicians at First Foundation for all her gynecological and obstetrical care, including advice on contraception and options for dealing with pregnancy. Doe alleges that by restricting her access to accurate and complete abortion information, the government will interfere with her right to make personal decisions concerning contraception and childbearing. Complaint at ¶¶ 80-83, 92.

Plaintiffs Lindsay and Doe sue on their behalf and on behalf of two classes: employees of NGOs and women who rely on family planning information provided by NGOs, respectively.

Plaintiffs do not distinguish between AID's policy limitations on direct and indirect recipients. Rather, Planned Parenthood, PPCEP, Mott and Isaacs allege that as applied, the Standard Clause provisions infringe the exercise of their right to speak and to associate with foreign NGOs for purposes of speech and advocacy concerning family planning issues and abortion.

In September, 1987, this Court dismissed the complaint, holding both that AID's actions do not violate the terms of, nor exceed the authority granted by, the Foreign Assistance Act of 1961, and that Planned Parenthood's first amendment claims in the foreign policy context present non-justiciable political questions. *Planned Parenthood Fed. v. Agency for International Development*, 670 F. Supp. 538 (S.D.N.Y. 1987). The Second Circuit Court of Appeals affirmed the holding that the Standard Clause was within the defendants' statutory and administrative authority, but concluded that some of plaintiffs' first amendment claims do not present non-justiciable political questions. *Planned Parenthood Fed. v. Agency for International Development*, 838 F.2d 649 (2d Cir. 1988). Thus, the Second Circuit remanded the case to

this Court for adjudication of the constitutional claims pertaining to the Standard Clause.

Defendants now move to dismiss plaintiffs' first amendment claims for failure to state a claim upon which relief can be granted. They have also moved to dismiss the individual plaintiffs' claims and those of the proposed intervenors, Rodrigues and Roe, for lack of standing.

II. *DISCUSSION*

At the outset, the Court emphasizes that this case is before it on a motion to dismiss, not on a motion for summary judgment. The limited function of a motion to dismiss "is merely to assess the legal feasibility of the complaint." *Ryder Energy Distribution v. Merrill Lynch Commodities*, 748 F.2d 774, 779 (2d Cir. 1984). The court should deny the motion unless it appears to a certainty that a plaintiff can prove no set of facts entitling her to relief. *Conley v. Gibson*, 355 U.S. 41, 45-6 (1957). Furthermore, it is well settled that on a motion to dismiss, the Court must accept the factual allegations of the conıplaint as true. *Luce v. Edelstein*, 802 F.2d 49, 52 (2d Cir. 1986). Applying this standard, the Court first examines plaintiffs' principal constitutional claim that the Standard Clause violates their speech and associational rights, and then turns to plaintiff Doe's privacy claim.

A. *Speech and Associational Claims*

The goal of the United States Government, as articulated in the Mexico City Policy and echoed in the complaint, is to disassociate itself from foreign NGOs that perform or promote abortion by withholding or discontinuing federal contributions to such NGOs. Plaintiffs allege that in implementing that policy, the Standard Clause interferes with their constitutionally-protected right to speak overseas about abortion, and to associate with others, including foreigners, for that purpose. *See Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Bullfrog Films. Inc. v. Wick*, 847 F.2d 502 (9th Cir. 1988). Upon review of the complaint, to which the Court must restrict its inquiry in this motion to dismiss, the Court finds that, even assuming *arguendo* that the Standard Clause does interfere with the plaintiffs' speech and associational rights, the Standard Clause is nonetheless a valid, constitutional exercise of the executive's power to regulate foreign affairs.

Plaintiffs argue that while the immediate impact of the Standard Clause is upon foreign NGOs, it also restricts the speech and associational rights of domestic NGOs, such as Planned Parenthood and PPCEP, and United States citizens, such as Issacs and Mott, who wish to associate with foreign NGOs in privately funded advocacy, education, and counseling regarding abortion. Plaintifs allege that since foreign NGOs depend upon AID funds, they have no practical choice but to submit to the Standard Clause and thereby completely forego abortion related associations with organizations that advocate abortion, such as Planned Parenthood and PPCEP, even in programs unrelated to AID family planning efforts and even with non-AID funds. Thus while the stated purpose of the Standard Clause is to implement the disassociational aims of the Mexico City Policy by withholding AID grants from foreign NGOs except where they engage in no abortion related activity, plaintiffs argue that it has the effect of preventing foreign NGOs that receive AID funds and domestic NGOs from associating with each other for the purposes of receiving or disseminating abortion information using non-U.S. government money.

There is a substantial question whether the decision to withhold government funding in the circumstances presented here can amount to a deprivation of constitutional rights. *See, e.g., Lyng v. International Union, UAW*, 108 S.Ct. 1184, 1190-91 (1988); *Regan v. Taxation with Representation*, 461 U.S. 540, 549 (1983); *Harris v. McRae*, 448 U.S. 297, 318 (1980). The Supreme Court has held "in several contexts [including the First Amendment] that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Lyng*, 108 S. Ct. at 1190 (quoting *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 549 (1983). Where a fundamental right is not infringed,

the court is merely required to ascertain whether the statutory classification is rationally related to a legitimate governmental interest. *Id.* at 1192. However, even assuming *arguendo* that the Standard Clause does infringe constitutionally protected rights of association and speech, plaintiffs' associational and speech rights are still not absolute. If an infringement of first amendment associational or speech rights is identified, it ordinarily can be justified by a showing that the constraint is necessary to serve an important or substantial governmental interest, and that it does so in the least restrictive manner that will serve that interest. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *United States v. O'Brien*, 391 U.S. 367 (1968). In this case, since the governmental interest supports the actions at issue under even the higher standard as articulated and applied in *Roberts*, I will assume the associational and speech infringements as alleged by the plaintiffs.

The Mexico City Policy, which the Standard Clause was promulgated to implement, is an articulation of a United States foreign policy decision to completely disassociate itself from foreign NGOs that "perform or actively promote abortion as a method of family planning in other nations" in accord with the government's belief that "abortion is not an acceptable element of family planning programs." Whether plaintiffs agree with this foreign policy is relevant at the polls; here, however, it is irrelevant. As the Second Circuit specifically noted in its earlier review of the Mexico City Policy: "courts are not competent to formulate national policy or review controversies which 'revolve around policy choices and value determinations constitutionally committed to Congress or the executive branch.'" *Planned Parenthood*, 838 F.2d at 655 (*quoting Japan Whalino Ass'n v. American Cetacean Society*, 106 S.Ct. 2860, 2866 (1986)). The Mexico City Policy embodies foreign policy choices and value judgments of the type committed to both Congress and the Executive, but not the courts. Since this Court is satisfied after careful review that the the Mexico City Policy embodies a legitimate and subtantial government interest, it must defer to the considered judgments of the Executive branch. Accordingly, it is not for this Court to assess the policy's merits and substitute

its own values, but rather to restrict its inquiry to the constitutionality of its implementing mechanism, the Standard Clause. *See Id.* 838 F.2d at 655-56.

With its inquiry thus circumscribed, the Court concludes that the Standard Clause promulgated by the executive branch meets constitutional muster. The executive's power in the realm of foreign policy is broad indeed. "As a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations. . . The President is the sole organ of the nation in its external relations. . ." *U.S. v. Curtiss-Wright Corp.*, 299 U.S. 304, 318-319 (1936). It is within the executive branch's plenary authority over foreign affairs to disassociate the United States completely from foreign organizations based upon their views or activities.

There simply is no requirement that the government have some non-viewpoint-based justification for its foreign policies. Indeed, the contrary is the norm. The government may, as a matter of its foreign policy choices, discriminate on the basis of its political views in deciding which foreign governments and NGOs will further United States interests and one vehicle it may employ in doing so is its power to grant foreign assistance. Thus, the government withholds aid to countries which sanction international terrorism, *see* 22 U.S.C. § 2371(a), and grants aid in opposition to apartheid to South African NGOs promoting "political, economic, social, juridical and humanitarian efforts to foster a just society." *See* 22 U.S.C. § 2151n(e)(2). These funding decisions are, of course, no less viewpoint based than the decision to withhold funds from foreign NGOs that engate in abortion related activities. Furtherance of executive-determined foreign policies, such as the Mexico City Policy, is undoubtedly a substantial and important government interest such as would outweigh the indirect and incidental associational impairments presented in this case. Where, as here, the executive exercises its traditional foreign policy powers and any infringement remains incidental or indirect, the exercise is not constitutionally infirm.

For this Court to conclude anything otherwise would necessitate an impermissible inquiry into the merits of the policy choices committed to the political branches. *See Planned Parenthood*, 838 F.2d at 655. Moreover, this is not a case where there is a direct ban on plaintiffs' associational relations. Nor does the Mexico City Policy deliberately target domestic NGOs that engage in the disfavored activity. Such entities are free to employ their own funds to those ends. And while the practical effect of the Standard Clause may be to lessen or even cut off associational relations between domestic and foreign NGO's on the subject of abortion, again that is not its objective.

Having determined that the government has an important and substantial interest in implementing the Mexico City Policy such as would outweigh the associational impairments alleged, the remaining inquiry is whether its vehicle for doing so, the Standard Clause, accomplishes that result in the least restrictive manner. I hold that it does. The Standard Clause parallels the very language of the Mexico City Policy. In providing that domestic NGOs may not subgrant federal family planning funds "to any foreign [NGO] which performs or actively promotes abortions as a method of family planning in AID-recipient countries," the Standard Clause is no broader than the Mexico City Policy, but is in all respects identical to it. It does nothing to create any impact on the associational opportunities of domestic NGOs beyond that which flows from the Mexico City Policy itself, and it must therefore be upheld.

This is not a case in which segregated accounts would provide a less restrictive means of implementing a government policy. The government's foreign policy objective is to disassociate completely the United States government from any foreign NGOs that promote or advocate abortion in *any way*, through use of *any funds*, including non-AID funds. While segregated accounts might be sufficient were the objective to prevent AID funds from being used for abortion related activity, that is not this case. The government's objectives are broader, namely to avoid any possibility of taint by completely disassociating itself from any foreign NGOs that per-

form or promote abortion. If plaintiffs dislike the government's policy and seek to design a system of segregated accounts, their proper recourse is through legislative, not judicial means. The Standard Clause, as broad as it may be, is necessary and no more than necessary, to implement what this Court has deterrmined to be the government's legitimate, albeit far-reaching foreign policy objective.

Plaintiffs argue that their challenge to the government's motives in implementing the Mexico City Policy through use of the Standard Clause requires discovery and a trial. In this regard plaintiffs allege that the Mexico City Policy does not reflect judgments about foreign affairs, but was a response to domestic political pressure on the Reagan Administration and was adopted not to advance a foreign policy purpose but to serve the Administration's domestic political interests. Complaint at ¶ 30. They also allege that the "reason for the promulgation of the policy and the Standard Clause was to advance the Reagan Administration's effort to suppress pro-choice views and activities in the United States . . . and not for any purported concern with foreign policy or other legitimate governmental purpose." Complaint at ¶ 97.

These attacks on the motives underlying the Mexico City Policy, even if they can be fully substantiated, are incapable of judicial resolution. In finding the Standard Clause justiciable as an implementing mechanism, the Second Circuit acknowledged that "[t]he complaint. . . contain[ed] nonjusticiable attacks on the [Mexico City Policy] Statement." *Planned Parenthood*, 838 F.2d at 655. These are just those attacks. This Court is simply in no position to inquire into the motives underlying the President's foreign policy initiative. *See Japan Whaling Ass'n.*, 106 S.Ct. at 2866 (courts are not competent to review controversies which "revolve around policy choices and value determinations constitutionally committed to" Congress or the executive branch).

The Court notes in passing that the claim that this foreign policy initiative is designed to appeal to a domestic political constituency cannot be a basis for questioning its constitutionality. In a representative democracy few executive and congressional initiatives, foreign or domestic, are undertaken

without at least some reference to domestic political consequences. The further claim that the policy and the Standard Clause were designed solely "to advance the Reagan Administration's effort to suppress pro-choice views and activities in the United States" is similarly insubstantial. The Standard Clause places no direct restrictions on activities of domestic NGOs or the views they may advocate in the United States with their own funds. They are prohibited from subgranting AID funds to foreign NGOs that perform or promote abortion overseas. Thus, whatever the intent behind the policy and the Standard Clause, they do not have the effect of suppressing views and activities in the United States. Furthermore, as previously discussed, the Mexico City Policy and its implementing provisions are a valid articulation and exercise of a government foreign policy decision to disassociate United States dollars from foreign organizations based upon their views. While plaintiffs may disagree with that decision, the Court cannot be their vehicle to invalidate it.

Thus, applying a traditional first amendment balancing test, the Mexico City Policy and its implementing mechanism, the Standard Clause, pass constitutional muster. They are within the statutory and constitutional power of the government; they advance a substantial governmental foreign policy interest; and their incidental intrusion on the rights of domestic NGOs is "no greater than is essential to the furtherance of the [government's] interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Accordingly, Planned Parenthood's, PPCEP's, Mott's, Isaacs' and Lindsay' claims must be dismissed.

B. *Other Claims*

Plaintiff Doe claims that because she relies on an AID-funded health care facility in Nigeria for her gynecological and obstetrical care, the Mexico City Policy and the Standard Clause unconstitutionally impede her right of privacy to receive full, accurate information about abortion in order to make informed decisions about family planning. In *State of New York et. al. v. Sullivan*, 889 F.2d 401 (2d Cir. 1989), the

Second Circuit rejected a similar attempt to invalidate regulations restricting the abortion related activities of domestic organizations receiving government funding under Title X of the Public Health Service Act.[4] Judge Winter, writing for the majority, found that prohibitions on counseling and advocacy concerning abortion within Title X projects did not violate either the first and fifth amendment rights of pregnant women or the first amendment rights of health care providers. Citing *Reproductive Health Service v. Webster*, 109 S. Ct. 3040 (1989), Judge Winter reasoned that while "the regulations in question may hamper or impede women in exercising their privacy right in seeking abortions . . . so long as no affirmative legal obstacle to abortion services is created by the denial of the use of government money, facilities, or personnel, the practical effect of such a denial on the availability of abortion services is constitutionally irrelevant." *New York State et. al. v. Sullivan*. 889 F.2d at 411.

Applying Second Circuit precedent, as the Court must, it strains logic to suggest that the restrictions at issue here are constitutionally infirm. That the Standard Clause was promulgated in the foreign policy context only advances the government's position. Thus, applying *Sullivan* and the Supreme Court cases cited therein,[5] the Court finds that whatever obstacles are placed in Doe's path are not of consti-

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4 The statutory authority for these regulations is Section 1008, 42 U.S.C. §300a-6, of Title X of the Public Health Service Act, 42 U.S.C. §§ 300 to 300a-41 (1982 & Supp. V 1987).

5 In particular, the Second Circuit, like the Supreme Court in *Webster*, relied heavily upon *Maher v. Roe*, 432 U.S. 464 (1977) and *Harris v. McRae*, 448 U.S. 297 (1980). In *Webster*, Missouri denied the provision of abortion services in all public facilities, including hospitals, in order to "encourage childbirth over abortion." 109 S.Ct. at 3052. The Supreme Court concluded that "[a]s in [*Maher* and *McRae*], the State's decision here to use public facilities and staff to encourage childbirth over abortion 'places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy.'" 109 S.Ct. at 3052, *quoting McRae*, 448 U.S. at 315. This prohibition seems substantially greater in impact than the regulations challenged here. Thus, since this Court is bound by *Webster*, it cannot hold that the Standard Clause triggers constitutional concern.

tutional significance. To rule otherwise would be to ignore the teachings of *Sullivan*. Accordingly, Doe's claim is dismissed.

III. *CONCLUSION*

For the reasons set forth above, the claims of all plaintiffs are dismissed. Accordingly, the Court need not consider the motions of Florida Rodrigues and Rachel Roe to intervene.

SO ORDERED.

Dated: New York, New York
March 7, 1990

/s/ J. WALKER
United States Circuit Judge

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 551—August Term, 1987

(Argued December 4, 1987 Decided January 29, 1988)

Docket No. 87-6246

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., PLANNED PARENTHOOD CENTER OF EL PASO, STEWART R. MOTT, STEPHEN L. ISAACS, SOSAMMA LINDSAY and REBECCA RAMOS, on behalf of themselves and others similarly situated, and JANE DOE, on behalf of herself and others similarly situated,

Plaintiffs-Appellants,

—against—

AGENCY FOR INTERNATIONAL DEVELOPMENT, and M. PETER MCPHERSON, as Administrator of the Agency for International Development,

Defendants-Appellees.

Before:

TIMBERS and MINER, *Circuit Judges*,
and LASKER, *District Judge*.*

* Hon. Morris E. Lasker, United States District Judge, Southern District of New York, sitting by designation.

Appeal from a judgment of the United States District Court for the Southern District of New York (Walker, J.) dismissing the complaint, pursuant to Fed. R. Civ. P. 12(b)(6), on the grounds that the complaint does not state a claim under the Foreign Assistance Act and the constitutional claims raise non-justiciable political questions. Affirmed in part, reversed in part and remanded.

ROGER K. EVANS, New York, NY (Eve W. Paul, Dara Klassel, Planned Parenthood Federation of America; Walter Slocombe, Geoffrey Judd Vitt, Julia L. Porter, Caplin & Drysdale, Washington, D.C., of counsel) *for Plaintiffs-Appellants*.

CAROLYN L. SIMPSON, Assistant U.S. Attorney (Rudolph W. Giuliani, U.S. Attorney for the Southern District of New York; Steven E. Obus, Assistant U.S. Attorney, of counsel) *for Defendants-Appellees*.

Janet Benshoof, Rachael Pine, Lynn Paltrow, Dawn Johnsen, American Civil Liberties Union, New York, NY, filed a brief *for Amici Curiae American Civil Liberties Union, New York Civil Liberties Union, Fund for Free Expression, Professional Rights Comm. of American Society of Journalists and Authors, Inc.*, and *New York Academy of Sciences*.

MINER, *Circuit Judge*:

Plaintiffs-appellants Planned Parenthood Federation of America, Inc. ("Planned Parenthood"), Planned Parenthood Center of El Paso, Stewart R. Mott, Stephen L. Isaacs, Sosamma Lindsay, Rebecca Ramos and Jane Doe, on behalf of themselves and others similarly situated, appeal from an order entered in the United States District Court for the Southern District of New York (Walker, J.) granting the motion of defendants-appellees Agency for International Development ("AID") and M. Peter McPherson, as Administrator of AID, to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6). Appellants challenge the lawfulness of AID's implementation, via clause provisions inserted in family planning grants and cooperative agreements ("Standard Clause"), of the Policy Statement of the United States of America (the "Statement"), which was delivered in August 1984 at the United Nations International Conference on Population in Mexico City. Appellants assert that 1) defendants' actions violate the terms of, and exceed the authority granted by, the Foreign Assistance Act of 1961, 22 U.S.C. § 2151 *et seq*. (1982 and Supp. III 1985), and 2) the Standard Clause imposes impermissible restrictions, as a condition of receiving federal funds, on appellants' first amendment right to speak about and advocate the availability and benefits of abortion and to associate with foreign persons and entities for purposes of such speech and advocacy. In addition, Planned Parenthood claims that the Standard Clause violates its first amendment rights by requiring it to espouse, circulate and enforce views with which it does not agree.

The district court granted defendants' motion to dismiss the complaint, pursuant to Fed. R. Civ. P. 12(b)(6), finding that 1) the Statement and Standard Clause are within defendants' statutory and administrative authority, and 2) appellants' first amendment claims present non-justiciable political questions.

We agree that defendants acted within their statutory and administrative authority; however, we conclude that the first amendment claims do not present non-justiciable political questions. Therefore, we affirm in part, reverse in part and remand this action to the district court for adjudication of appellants' first amendment claims.

BACKGROUND

The Foreign Assistance Act of 1961, 22 U.S.C. § 2151 *et seq.* (1982 & Supp. III 1985), authorizes foreign assistance for, *inter alia*, voluntary population planning "[i]n order to increase the opportunities and motivation for family planning and to reduce the rate of population growth." 22 U.S.C. § 2151b(b). The Act grants the President the authority to provide this assistance "on such terms and conditions as he may determine." *Id.* Presidential discretion is not entirely unfettered, however, for the Act prohibits the use of federal money for, *inter alia*, "the performance of abortions as a method of family planning, or to motivate or coerce any person to practice abortions," or biomedical research relating to abortion as a means of family planning. *Id.* § 2151b(f)(1), (3). The President has delegated his section 2151b(b) discretionary authority to the Director of the United States International Development and Cooperation Agency, Exec. Order No. 12,163, 44 Fed. Reg. 56,673 (1979), who, in turn,

has delegated that authority to the Administrator of AID, IDCA Delegation No. 1, 44 Fed. Reg. 57,521 (1979), as amended, 45 Fed. Reg. 74,090 (1980).

In August 1984, a United States delegation to the United Nations International Conference on Population in Mexico City presented the "Policy Statement of the United States of America," issued by the White House on July 13, 1984, which commits the United States to withhold federal assistance from foreign nongovernmental organizations ("NGOs") that perform or actively promote abortions, even if those activities are financed with non-federal funds. The Statement provides, in pertinent part:

> [T]he United States does not consider abortion an acceptable element of family planning programs and will no longer contribute to those of which it is a part. Accordingly, when dealing with nations which support abortion with funds not provided by the United States Government, the United States will contribute to such nations through segregated accounts which cannot be used for abortion. Moreover, the United States will no longer contribute to separate nongovernmental organizations which perform or actively promote abortion as a method of family planning in other nations. . . .
>
> U.S. Government authorities will immediately begin negotiations to implement the above policies with the appropriate governments and organizations.

At the time the Statement was presented, foreign NGOs were prohibited by 22 U.S.C. § 2151b(f) from using federal funds to finance abortion-related activities, but

were otherwise not prohibited from engaging in those activities.

· Following the presentation of the Statement, AID drafted the Standard Clause, which contains new eligibility provisions for foreign NGOs, for inclusion in family planning grants and cooperative agreements. AID administers the voluntary population planning program, in part, by entering into cooperative agreements with domestic and foreign NGOs, which, in turn, subgrant the federal funds to foreign family planning organizations that provide direct services to individuals. The Standard Clause requires every foreign NGO that receives federal family planning funds to "certify in writing that it does not perform or actively promote abortion as a method of family planning in AID-recipient countries and does not provide financial support to any other foreign NGO that conducts such activities." The Standard Clause defines "actively promot[ing] abortion" to include, *inter alia*, "providing advice and information regarding the benefits and availability of abortion," "encouraging abortion," and "[l]obbying a foreign government to legalize or make available abortion." Domestic NGOs that receive federal family planning grants must agree, as a condition of receipt, that they "will not furnish assistance under th[e] grant" to foreign NGOs that perform or "actively promote" abortion-related activities.

Planned Parenthood, a domestic NGO, has been a major recipient of federal family planning funds since 1971. In 1986, Planned Parenthood received $17.7 million from AID and distributed abroad over $13 million worth of AID-provided medical equipment and supplies and educational materials. Planned Parenthood assists 103 family planning organizations in 29 countries and finances these activities largely with AID family planning funds. Planned Parenthood's most recent cooperative agreement with AID, which was signed in May 1983, expired on December 31, 1987. AID officials have informed Planned Parenthood that when its cooperative agreement comes up for renewal in 1988, AID will renew federal assistance when Planned Parenthood signs an agreement containing the Standard Clause.

Appellant Lindsay is Dean of the College of Nursing of the University of East Africa in Barroton, Kenya; the University is an AID recipient. Lindsay's curriculum at the College of Nursing includes teaching about abortion in accordance with her personal views and the ethics of the nursing profession. Appellant Isaacs is the Director of the Development Law and Policy Program of the Center for Population and Family Health at Columbia University; Issacs intends to assist foreign public policy groups, many of whom receive AID funds, on studies of their nations' abortion laws and the effects of illegal abortions. Isaacs plans to work with those groups toward the reform of restrictive abortion laws by lobbying and public information efforts in their countries. Appellant Ramos is Director of Research and Special Projects of a private organization in Mexico that receives AID funds, and he often speaks on the subject of abortion. Appellant Mott works with organizations, including Planned Parenthood, to ensure that women in less developed countries may choose to have a safe, legal abortion. Appellant Doe is a patient in a medical center in Nigeria that receives AID funds, and who relies on that hospital for gynecological and obstetric advice and care. All of the individual plaintiffs are United States citizens.

In January 1987, Planned Parenthood and the other plaintiffs-appellants brought this action on behalf of themselves and others similarly situated, seeking 1) a declaration that the AID requirement that recipients of federal family planning funds agree not to perform or actively promote abortions is invalid and unenforceable; 2) an injunction barring AID's use of the Standard Clause as a condition to family planning funds; and 3) an injunction requiring AID to consider Planned Parenthood's application for family planning funds without regard to its position on abortion. Appellants contend that the Statement is inconsistent with 22 U.S.C. §§ 2151(a)[1] and 2151u(a)[2] and, therefore, the President

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1 22 U.S.C. § 2151(a) provides in pertinent part:

> [T]he Congress declares that a principal objective of the foreign policy of the United States is the encouragement and sustained support of the people of developing countries in their efforts to acquire the knowledge and resources essential to development and to build the economic, political, and social institutions which will improve the quality of their lives.

2 22 U.S.C. § 2151u(a) provides:

> The Congress finds that the participation of rural and urban poor people in their countries' development can be assisted and accelerated in an effective manner through an increase in activities planned and carried out by private and voluntary organizations and cooperatives. Such organizations and cooperatives, embodying the American spirit of self-help and assistance to others to improve their lives and incomes, constitute an important means of mobilizing private American financial and human resources to benefit poor people in developing countries. The Congress declares that it is in the interest of the United States that such organizations and cooperatives expand their overseas development efforts without compromising their private and independent nature. The Congress further declares that the financial resources of such organizations and cooperatives should be supplemented by the contribution of public funds for the

lacks the authority to adopt and implement the Statement. Appellants also assert that when Congress prohibited the use of federal funds for certain abortion-related activities, *see* 22 U.S.C. § 2151b(f)(1), (3), it precluded the imposition of restrictions on non-federal funds in the area of abortion-related activities.

Defendants moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6) on the grounds that the statutory claims are meritless, and that the constitutional claims present non-justiciable political questions and cannot be raised by appellants for lack of standing.

On the statutory claims, the district court held that neither section 2151(a) nor section 2151u(a) limits the President's section 2151b(b) discretion to refuse United States support for foreign NGOs that engage in abortion-related activities, noting, *inter alia*, that "absent a specific limitation on the Executive's authority to condition dispersal of United States funds to foreign NGOs, it must be assumed that Congress has left intact his discretion to refuse to do so." *Planned Parenthood Federation of America, Inc. v. AID*, 670 F. Supp. 538, 544 (S.D.N.Y. 1987). The court also pointed to Congress' reaction fol-

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> purpose of undertaking development activities in accordance with the principles set forth in section 2151-1 of this title and, if necessary and determined on a case-by-case basis, for the purpose of sharing the cost of developing programs related to such activities. The Congress urges the Administrator of the agency primarily responsible for administering this subchapter, to draw on the resource of private and voluntary organizations and cooperatives to plan and carry out development activities and to establish simplified procedures for the development and approval of programs to be carried out by such private and voluntary organizations and cooperatives as have demonstrated a capacity to undertake effective development activities.

lowing the issuance of the Statement. In 1984, the House of Representatives adopted a "Sense of the House" condemning the Statement, *see* Foreign Assistance and Related Programs Appropriations Act for fiscal year 1985, Pub. L. No. 98-473, 98 Stat. 1884, 1888 (1984). A year later, the House adopted an amendment endorsing the Statement, *see* 131 Cong. Rec. H5348-H5355 (daily ed., July 10, 1985). Meanwhile, the Senate adopted an amendment prohibiting the implementation of the Statement, *see* S. Rep. No. 34, 99th Cong., 1st Sess. 32 (1985). Later, both amendments were withdrawn as a compromise to the disparate House and Senate positions, *see* H. Conf. Rep. No. 237, 99th Cong., 1st Sess. 118 (1985). The district court concluded that Congress' inaction "left intact" the President's broad discretionary authority and dismissed the statutory claims for failure to state a claim upon which relief could be granted.

On the constitutional claims, the district court acknowledged that "plaintiffs have drafted [the complaint] as a challenge to the AID Standard Clause and claim that the Clause infringes their [f]irst [a]mendment and privacy rights," 670 F. Supp. at 546, but determined that the claims are non-justiciable nevertheless because they are "targeted not merely at a method or means of implementation of a foreign policy, but at the foreign policy itself," *id.* at 547. The district court expressed its belief that it lacked "judicially discoverable and manageable standards," *id.* (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)) to resolve this action, because it determined that, in order to do so, it must weigh the merits and wisdom of the policy goals articulated by the Statement and must obtain the relevant information with which to "resolve the foreign policy issues relating to the use of abortions in

third world family planning," *id.* at 547-48. The court observed that any pronouncement by it that differed with the President on these "foreign policy questions" would create the "potentiality of embarrassment from multifarious pronouncements by various departments on one question," *id.* at 548 (citing *Baker*, 369 U.S. at 217), and found that the relief sought by appellants would "render wholly unenforceable the foreign policy determination itself and would amount to a ruling . . . requiring the Executive to render financial assistance abroad to applicants whose activities are squarely in opposition to the announced foreign policy of the United States," *id.* at 549. The district court concluded that appellants' constitutional claims present non-justiciable political questions and dismissed them accordingly.

DISCUSSION

Statutory Claims

Appellants' contention that the Act prohibits the implementation of the Statement via the Standard Clause is without merit. It is a well-established rule of statutory interpretation that "[i]f Congress has directly spoken to the precise issue in question, if the intent of Congress is clear, that is the end of the matter." *Japan Whaling Ass'n v. American Cetacean Society*, 106 S. Ct. 2860, 2867 (1986). On the other hand, when a court reviews an agency's construction of a statute which it administers and "Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron, USA v. Natural Resources Defense*, 467 U.S. 837, 843-44 (1984). We agree with the

district court's determination that the Statement and the Standard Clause are within defendants' section 2151b(b) authority and that neither contradicts the terms of sections 2151(a), 2151u(a) or 2151b(f) of Title 22.

Section 2151(a) declares that "a principle objective of the foreign policy of the United States" is to aid developing countries in their efforts to acquire "the knowledge and resources essential to development." However, as we have previously acknowledged, section 2151(a) does not require AID to assist all family planning projects that apply for federal funds, and AID has "broad discretionary power" to decide which, among numerous competing projects, will be given family planning funds. *See Alan Guttmacher Institute v. McPherson*, 616 F. Supp. 195, 207 (S.D.N.Y. 1985), *aff'd*, 805 F.2d 1088 (2d Cir. 1986). Therefore, the fact that AID has adopted and implemented a policy which withholds federal support to organizations that engage in abortion-related activities does not violate the terms of section 2151(a).

Appellants next argue that the Statement and Standard Clause contradict section 2151u(a). Section 2151u(a) affirms the United States' commitment to assist private and voluntary organizations in their efforts to further development overseas and provides that "it is in the interest of the United States that such organizations and cooperatives expand their overseas development efforts without compromising their private and independent nature." Although section 2151u(a) refers to the United States' "interest" in private organizations, it does not contain any mandatory language. Indeed, according to its terms, the Government may choose not to use private organizations at all. While section 2151u(a) might be interpreted to prohibit AID's entanglement in the day-to-day administration of a foreign NGO or an AID requirement that an organization affirmatively espouse a certain viewpoint, appellants make no allegations of this sort. At most, section 2151u(a) requires only that the Government consider the private and independent nature of private organizations which it utilizes. We are mindful of the broad grant of authority accorded to the President by section 2151b(b) and, without any language limiting the President's authority in his use of private organizations, we cannot say that section 2151u(a) has been violated.

The only limitation that Congress placed upon the President's discretionary authority is set forth in section 2151b(f). Section 2151b(f) prohibits the use of federal funds for certain abortion-related activities, including the performance of abortions as a method of family planning. Appellants assert that when Congress adopted section 2151b(f), Congress specifically addressed the issue of whether limitations should be imposed on the use of non-federal funds for abortion-related activities, and, therefore, the President cannot impose additional limitations relative to that issue. We cannot agree. A flaw in appellants' argument is that section 2151b(f) is a limitation on the use of federal funds, not on *non-federal* funds. Appellants might have a meritorious argument if Congress had affirmatively rejected a provision similar to the Statement and Standard Clause in favor of section 2151b(f); in fact, the Congress that enacted section 2151b(f) never considered such a provision. The language which appellants point to:

> We could, in fact, go far beyond the present amendment and require all abortion activities, from whatever funds, to be stopped before our assistance could

be received. But the present amendment does not do that.

119 Cong. Rec. S32292-93 (daily ed., Oct. 1, 1973) (statement of Sen. Helms), does not indicate that Congress "has spoken" on the issue of whether limitations may be imposed on the use of non-federal funds. At most, Sen. Helms' statement indicates that Congress was aware that it *could* consider an amendment containing such limitations on non-federal funds, not that Congress considered, but chose not to adopt, such limitations. Thus, we must conclude that the Congress which enacted section 2151b(f) never addressed the issue of limitations on non-federal funds. In addition, we agree with appellants that Congress' mixed reaction to the Statement amounted to no more than "congressional inaction," *see, e.g., Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1472-73 (1987) (Scalia, J., dissenting) (noting that subsequent congressional inaction may not represent approval of status quo), leaving the issue of whether limitations may be imposed on non-federal funds to be resolved in light of the intent, if any, of the Congress that enacted section 2151b(f). As we have discussed above, Congress has not evidenced any intent on this issue; therefore, we agree with the district court that "absent a specific limitation on the Executive's authority to condition dispersal of United States funds to foreign NGOs, it must be assumed that Congress has left intact" the President's discretion to place conditions upon or refuse funding to such organizations, *Planned Parenthood*, 670 F. Supp. at 544.

Political Question

In determining whether a case presents a non-justiciable political question, the court must first make a

"discriminating inquiry into the precise facts and posture of the particular case." *Baker v. Carr*, 369 U.S. 186, 217 (1962) (quoted in *Olegario v. United States*, 629 F.2d 204, 217 (2d Cir. 1980), *cert. denied*, 450 U.S. 980 (1981)). The fact that this case involves foreign affairs, an area constitutionally committed to the executive and legislative branches, does not end the court's inquiry as to whether the action presents a political question, *Olegario*, 629 F.2d at 217, for "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance," *Baker*, 369 U.S. at 211.

Here, the district court acknowledged that appellants drafted the complaint "as a challenge to the AID Standard Clause and claim that the Clause infringes their [f]irst [a]mendment and privacy rights," *Planned Parenthood*, 670 F. Supp. at 546. Despite the district court's recognition that the "precise issue" in this case is the constitutionality of the Standard Clause, the court held that none of appellants' constitutional claims present justiciable controversies because the complaint is "targeted not merely at a method or means of implementation of a foreign policy, but at the foreign policy itself," *id.* at 547. While the complaint may contain non-justiciable attacks on the Statement, that alone does not place appellants' challenge to the Standard Clause beyond judicial cognizance. After examining the "precise issue" identified by the district court, we conclude that it does not present a non-justiciable political question.

While courts are not competent to formulate national policy or to review controversies which "revolve around policy choices and value determinations constitutionally committed" to Congress or the executive branch, *Japan Whaling Ass'n*, 106 S. Ct. at 2866, it is a court's duty to

determine whether the political branches, in exercising their powers, have "chosen a constitutionally permissible means of implementing that power," *INS v. Chadha*, 462 U.S. 919, 940-43 (1983). In this action, appellants contend that the Standard Clause is an unconstitutional means of implementing AID's policies. AID asserts that both the Statement and the Standard Clause embody U.S. foreign policy, and therefore are both immune from judicial review. We cannot agree with AID's position. Assuming that the Statement declares a foreign or national policy that the United States "will no longer contribute to . . . organizations which perform or actively promote abortion," it does not follow that requiring appellants to agree to allegedly unconstitutional limitations on their free speech is also foreign or national policy. Nor can AID transform the Standard Clause into foreign policy simply by affixing the label "foreign policy," *see Baker*, 369 U.S. at 217 (noting "the impossibility of resolution by any semantic cataloguing"). Therefore, we hold that appellants' constitutional claims "challenge the legality of AID's implementation of the [Statement]," *DKT Memorial Fund, Ltd. v. AID*, 810 F.2d 1236, 1238 (D.C. Cir. 1987) (emphasis supplied), and do not require the court to pass upon the "political and social wisdom of AID's foreign policy," *id*. We observe that if Planned Parenthood's challenge were successful, the Statement could be implemented in a number of alternative ways without compromising AID's policy, such as contributing to NGOs through segregated accounts, as AID does in its government-to-government dealings.

Finally, we cannot agree with the district court that this case presents "a lack of judicially discoverable and manageable standards," and "the potentiality of embarrassment from multifarious pronouncements," *Baker*, 369 U.S. at 217. The district court's analysis was premised on the erroneous assumption that this case requires an evaluation of the policies articulated in the Statement. As discussed above, it is not necessary for the court to attempt such an endeavor. Appellants' constitutional challenge to the Standard Clause merely requires the court to apply well-established principles of First Amendment traditionally vested in the jurisprudence, an area traditionally vested in the federal courts, *see Elrod v. Burns*, 427 U.S. 347, 351-52 (1976); *Powell v. McCormack*, 395 U.S. 486, 549 (1969). Thus, there is no lack of judicially discoverable or manageable standards. Nor is there any potentiality of embarrassment from multifarious pronouncements: It is the responsibility of the courts "to act as the ultimate interpreter of the Constitution," *Powell*, 395 U.S. at 549, and the judiciary "cannot shirk [its constitutional responsibilit[ies] merely because [a] decision may have overtones," *Japan Whaling Ass'n*. 106 S. Ct. at 2866.

CONCLUSION

Based on the foregoing, we affirm in part, reverse in part, and remand this action to the district court for adjudication of constitutional claims. The mandate shall issue appellants forthwith.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 87 Civ. 0248 (JMW)

Sept. 29, 1987

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.; Planned Parenthood Center of El Paso; Stewart R. Mott; Stephen L. Isaacs, Sosamma Lindsay and Rebecca Ramos, on Behalf of themselves and others similarly situated, and Jane Doe, on Behalf of herself and others similarly situated,

Plaintiffs,

—v.—

AGENCY FOR INTERNATIONAL DEVELOPMENT and M. Peter McPherson, as Administrator of the Agency for International Development,

Defendants.

Howard M. Fry, General Counsel, Stephen R. Tisa, Atty., Agency for Intern. Development, Washington, D.C., for defendants; Paula A. Sweeney and Harriet Goldberg, Asst. U.S. Attys., of counsel.

Rudolph W. Giuliani, U.S. Atty., S.D.N.Y., for U.S.

Roger K. Evans, Eve Paul and Dara Klassel, Planned Parenthood Federation of America, New York City, Walter B. Slocombe, Geoffrey Judd Vitt and Julia L. Porter, Caplin & Drysdale, Chartered, Washington, D.C., for plaintiffs; Harriet Pilpel, New York City, of counsel.

MEMORANDUM AND ORDER

WALKER, District Judge:

Introduction

This case raises the question, among others, of the circumstances under which the courts should refrain from entering the realm of foreign policy committed to the political branches of government. In their Complaint, plaintiffs attack the statutory and constitutional validity of (i) a Presidential policy denying federal assistance to foreign non-governmental organizations ("NGOs") that "perform or actively promote abortion as a method of family planning in other nations"[1] ("Policy" "Mexico City Policy") and (ii) a standard contract provision through which the agency charged with dispersing federal family planning assistance implements the Policy. The government defendants move to dismiss the Complaint. They assert that the Complaint fails to state a claim upon which relief can be granted since the statutory challenge is meritless and because the constitutional challenge (a) involves a "political question" beyond the competence of the courts and (b) may not be raised by these plaintiffs who lack standing. On a Rule 12(b)(6) motion, such as this, the allegations of the Complaint are presumed true and the reasonable inferences therefrom are construed in plaintiffs' favor. *Sheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974).

1 Policy Statement of the United States of America at the United Nations International Conference on Population (Second Session) 5, Mexico, D.F. (August 6-13, 1984). *See* Attachment to Defendant's Memorandum of Law.

Statutory and Factual Background

1. The Statute and Certain Funding Features

The Foreign Assistance Act of 1961, *as amended,* 22 U.S.C. §§ 2151 *et seq.* ("FAA"), empowers the President to furnish assistance for foreign population planning. The FAA recognizes that effective family planning is "often a matter of political and religious sensitivity," 22 U.S.C. § 2151b(a), and authorizes the President "to furnish assistance, on such terms and conditions as he may determine, for voluntary population planning." 22 U.S.C. § 2151b(b).

The Act then limits Presidential discretion by prohibiting the use of federal money to further certain abortion related activities. It precludes, in 22 U.S.C. § 2151b(f), the use of family planning funds (i) to pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions; (ii) to pay for the performance of involuntary sterilizations as a method of family planning or to motivate or coerce or provide any financial incentive to any person to undergo sterilizations; and (iii) for any biomedical research relating to abortion or involuntary sterilization as a means of family planning.[2]

In all relevant respects, the President has delegated his § 2151(b) discretionary authority to the Director of the United States International Development and Cooperation Agency ("IDCA"). Exec. Order No. 12,163, 44 Fed.Reg. 56,673 (1979). The Director of IDCA, in turn, has delegated that authority to the Administrator of the Agency for International Development ("AID"). IDCA Delegation No. 1, 44 Fed. Reg. 57,521 (1979), as amended, 45 Fed. Reg. 74,090 (1980).

Under the authority of § 2151b(b), AID provides funds through family planning grants and cooperative agreements to international agencies, foreign governments and both foreign and domestic NGOs. An AID grantee, whether foreign or domestic, may then subgrant funds it receives from AID. AID evaluates and passes upon applications for funds under a variety of criteria, many of which are set forth in a document known as "AID Handbook 13 (grants)" ("Handbook 13"). This document contains a number of standard provisions for insertion into population planning grants and cooperative agreements with NGOs, including the one that plaintiffs challenge here.

2 In addition, in the Foreign Assistance and Related Programs Appropriations Act for the fiscal year 1985, Pub.L. No. 98-473, 98 Stat. 1884, 1887-88, (1984) Congress prohibited distribution of funds to any organization that "includes as part of its population planning programs involuntary abortion."

2. The Mexico City Policy Statement

In August 1984, a United States delegation to the United Nations International Conference on Population in Mexico City presented a statement of United States policy on the subject of population growth to the 140 nation conference ("Mexico City Policy Statement"). The Mexico City Policy Statement was issued by the White House on July 13, 1984. In pertinent part, it states:

> The International Conference on Population offers the U.S. an opportunity to strengthen the international consensus on the interrelationships between economic development and population which has emerged since the last such conference in Bucharest in 1974. Our primary objective will be to encourage developing countries to adopt sound economic policies and, where appropriate, population policies consistent with respect for human dignity and family values. As President Reagan stated in his message to the Mexico City Conference:
>
> > 'We believe population programs can and must be truly voluntary, cognizant of the rights and responsibilities of individuals and families, and respectful of religious and cultural values. When they are, such programs can make an important contribution to economic and social development, to the health of mothers and children, and to the stability of the family and of society.'

U.S. support for family planning programs is based on respect for human life, enhancement of human dignity, and strengthening of the family. Attempts to use abortion, involuntary sterilization, or other coercive measures in family planning must be shunned, whether exercised against families within a society or against nations within the family of man.

The United Nations Declaration of the Rights of the Child [1959] calls for legal protection for children before birth as well as after birth. In keeping with this obligation, the United States does not consider abortion an acceptable element of family planning programs and will no longer contribute to those of which it is a part. Accordingly, when dealing with nations which support abortion with funds not provided by the United States Government, the United States will contribute to such nations through segregated accounts which cannot be used for abortion. Moreover, the United States will no longer contribute to separate nongovernmental organizations which perform or actively promote abortion as a method of family planning in other nations [sic]. With regard to the United Nations Fund for Population Activities [UNFPA], the U.S. will insist that no part of its contribution be used for abortion. The U.S. will also call for concrete assurances that the UNFPA is not engaged in, or does not provide funding for, abortion or coercive family planning programs; if such assurances are not forthcoming, the U.S. will redirect the amount of its contribution to other, non-UNFPA, family planning programs.

In addition, when efforts to lower population growth are deemed advisable, U.S. policy considers it imperative that such efforts respect the religious beliefs and culture of each society, and the right of couples to determine the size of their own families. Accordingly, the U.S. will not provide family planning funds to any nation which engages in forcible coercion to achieve population growth objectives.

U.S. Government authorities will immediately begin negotiations to implement the above policies with the appropriate governments and organizations.[3]

3. AID's Grant Conditions

Following the Mexico City Policy Statement, AID adopted new eligibility provisions for foreign NGOs for insertion, after negotiation, in family planning grants and cooperative agreements. *See* the "Standard Provision to be Used in Grants and Cooperative Agreements with U.S. Non-governmental Organizations" attached as Exhibit A to the Complaint ("Standard Clause").[4] Effective as of July 1985, it requires foreign NGOs to certify that they do not perform or actively promote abortion as a method of family planning in AID-recipient countries or provide financial support to any other foreign NGO that conducts such activities and, furthermore, that they will not do so during the term of the grant. *Id.* at 3. Domestic NGO AID-recipients, as a condition to the receipt of a family planning grant, must agree that they "will not furnish assistance under this grant to any foreign [NGO] which performs or actively promotes abortion as a method of family planning in AID-recipient countries or which provides financial support to any other foreign [NGO] that conducts such activities." *Id.* at 2-3.

Under this funding restriction, domestic NGOs are not prevented themselves from performing or actively promoting abortion as a method of family planning. While they may not subgrant AID funds to foreign NGOs that perform or actively promote abortion, they may provide any non-AID funds to foreign NGOs for any purpose, including performance and promotion of abortion.

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3 Policy Statement of the United States of America at the United Nations International Conference on Population (Second Session), at pp. 4-5. *See* Attachment to Defendant's Memorandum of Law.

4 The Standard Clause also appears in AID Handbook 13. *See* Attachment to Defendants' Memorandum of Law.

The Instant Action

The Complaint, filed in January 1987, challenges the constitutionality of the Standard Clause and the Policy, claiming, in essence, that they impose (i) an impermissible restriction on the First Amendment rights of plaintiffs to speak and advocate as to the availability and benefits of abortion and to associate for purposes of such speech and advocacy with foreign individuals and entities (Count One) and (ii) an interference with the privacy rights of family planning information recipients (Count Two). The Complaint also alleges that AID's adoption of the Standard Clause as a grant condition lacks statutory authority (Count Three) and was adopted in violation of the Administrative Procedure Act (Count Four) and the due process clause of the Fifth Amendment (Count Five). In responding to the instant motion, plaintiff-respondents have abandoned their claims under Counts Four and Five.

By way of relief, plaintiffs request (i) the issuance of a declaratory judgment that AID's policy of requiring that AID family planning fund recipients agree not to perform or actively promote abortions (as delineated in the Standard Clause) is invalid and unenforceable; (ii) an injunction barring AID's use of the Standard Clause as a condition to family planning funding; and (iii) an injunction that AID consider the application for AID funding of Plaintiff Planned Parenthood Federation of America, Inc. ("PPFA") without regard to PPFA's position on abortion.

Plaintiffs in this action are:

(1) PPFA whose formal program objectives include "assist-[ing] selected organizations in developing countries to increase access to voluntary fertility regulations services, including legal abortion, through information and education, provision of medical services, commodity distribution and lobbying." PPFA provides family planning funds, both AID and non-AID funds, to foreign NGOs in furtherance of the above policy objectives among others. PPFA conducts its

international funding activities through its Family Planning International Assistance ("FPIA") division.

(2) Planned Parenthood Center of El Paso, Inc. ("PPCEP"), a PPFA affiliate that provides family planning and counselling services to El Paso County, Texas and has a "longstanding concern about the access to safe and legal voluntary fertility regulation services, including abortion, in developing countries, especially Mexico."

(3) Stewart R. Mott ("Mott") who is "active in a variety of public policy issues" and a "regular contributor to PPFA for its international advocacy programs."

(4) Stephen L. Isaacs ("Isaacs") who is employed at Columbia University's Center for Population and Family Health as Director of the Development Law and Policy Program, a clearing house for family planning and related policy information in less developed countries.

(5) Sosamma Lindsay ("Lindsay") who is Dean of the University of East Africa's College of Nursing in Kenya. The University, although not its College of Nursing, receives AID funds for family planning.

(6) Rebecca Ramos ("Ramos"), who is a Director of Research and Special Projects for an unnamed NGO in Mexico that receives AID family planning funds from FPIA and other AID recipients.

(7) Jane Doe ("Doe") who is a patient of the First Foundation Medical Center in Lagos, Nigeria. First Foundation Medical Center is a recipient of AID family planning funds through an FPIA subgrant.

The individual plaintiffs are all United States Citizens. Plaintiffs Lindsay, Ramos and Doe sue on their behalf and on behalf of two classes: employees of NGOs and women who rely on family planning information provided by NGOs. By stipulation, the resolution of issues related to class certification has been deferred pending the outcome of defendants' motion to dismiss.

Defendants to the action are AID and its Administrator, M. Peter McPherson, to whom the President's authority to furnish voluntary population planning assistance has been delegated.

Discussion

1. Statutory Authority

In Count Three plaintiffs allege that the President lacks statutory authority to adopt and implement the Mexico City Policy through AID's new eligibility provisions. Inquiry into the Executive's power to place conditions on receipt of a congressionally authorized grant begins with an examination of the statute that empowers the President to confer the grant. Section 104(b) of the FAA authorizes the Executive to furnish family planning assistance to foreign organizations "on such terms and conditions as he may determine." Nowhere does the language of the FAA limit the Executive's discretion to deny funds to foreign NGOs, including those that perform or actively promote voluntary abortion as a method of family planning. Thus, the statute on its face appears to vest in the President authority to adopt and implement the Mexico City Policy.

The plaintiffs, however, point to several provisions in the FAA which, they argue, preclude the President from denying federal aid to foreign NGOs which perform or promote abortion. First, they contend that the exercise of the President's discretion is limited by §§ 2151(a) and 2151u(a). Section 2151(a) declares that a principle objective of United States foreign policy is to aid developing countries in the acquisition of "the knowledge and resources essential to development." Section 2151u(a) affirms United States commitment to assistance of private organizations in their efforts to further development overseas and states that "it is in the interest of the United States that such organizations and cooperatives expand their overseas development efforts without compromising their private and independent nature." According to plaintiffs, the Mexico City Policy is inconsistent with

§§ 2151(a) and 2151u(a) and, therefore, the President has exceeded his powers under the FAA by adopting it.

In *Alan Guttmacher Institute v. McPherson*, 616 F.Supp. 195 (S.D.N.Y. 1985), *aff'd*, 805 F.2d 1088 (2d Cir. 1986) Judge Haight considered the impact of § 2151(a) on the exercise of Presidential discretion under § 2151b(b). He concluded that AID may refuse to fund publication of articles discussing abortion despite the precatory language of § 2151(a). *Alan Guttmacher Institute*, 616 F.Supp. at 209. In Judge Haight's view, AID is charged with the task of distributing limited funds among numerous competing projects and "must be given broad discretionary power to create priorities to ease and objectify the job of picking and choosing among potential projects." *Id.* at 207. Selection by the Executive of areas most deserving of United States assistance, thus, does not violate § 2151(a) and, in fact, ideally leads to "the most efficient dissemination of the most important knowledge." *Id.* at 208.

Judge Haight's reasoning is instructive in this case. The Mexico City Policy prohibits United States support for foreign NGOs which, with their own money, perform or promote abortion as a method of family planning. This limits United States support for dissemination of specific information. The Policy, however, also frees funds for dissemination of other information considered more important by the Executive. "[T]he mere fact that this policy results in the failure to spread a certain type of knowledge does not necessarily set it at odds with the broad informational purpose of the statute." *Alan Guttmacher Institute*, 616 F.Supp at 208. Accordingly, we conclude that Section 2151(a) does not limit Presidential discretion to adopt the Mexico City Policy.

Nor does § 2151u(a)'s language in support of the "private and independent nature" of private organizations restrain the President from withholding United States funds from foreign NGOs that perform or promote abortion. Any criteria used by the Executive to select organizations for AID funding arguably impacts their "private and independent nature" because each must meet Executive eligibility requirements. The mere fact that the Mexico City Policy may affect the

behavior of NGOs who freely choose to alter or forego certain practices in order to qualify for AID funding does not compromise the independent nature of these organizations within the meaning of § 2151u(a).[5]

Plaintiffs next argue that since Congress limited the Executive's discretion through specific restrictions regarding use of AID funds for abortion-related activities in the FAA, § 2151b(f)(1) (the "Helms Amendment," adopted in 1973)[6], § 2151b(f)(3) (adopted in 1981)[7], an in the Foreign Assistance and Related Programs Appropriations Act for fiscal year 1985, Pub.L. No. 98-473, 98 Stat. 1884, 1887-8 (1984) ("Appropriations Act for 1985") (adopted in 1984)[8], Congress thereby intended that there be no other restrictions on foreign financial assistance including any requirement that foreign NGOs receiving U.S. funding not perform or promote abortion. In plaintiffs' view, Congress thus proscribed

5 Section 2151u(a) might prohibit AID's entanglement in the day-to-day administration of a voluntary organization or an AID requirement that an organization *affirmatively* espouse a certain viewpoint. No such situation is before the Court today. Further, the Court notes that the Mexico City Policy and AID eligibility requirements properly leave PPFA free to support with its own funds any NGO that fails to meet AID eligibility standards.

6 "None of the funds made available to carry out this subchapter may be used to pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions." 22 U.S.C. § 2151b(f)(1).

7 "None of the funds made available to carry out this subchapter may be used to pay for any biomedical research which relates, in whole or in part, to methods of, or the performance of, abortions or involuntary sterilization as a means of family planning." 22 U.S.C. § 2151b(f)(3).

8 "None of the funds appropriated under this paragraph may be available to any country which includes as part of its population planning programs involuntary abortion: *Provided further*, That none of the funds appropriated under this paragraph may be available to any organization which includes as part of its population planning programs involuntary abortion." Foreign Assistance and Related Programs Appropriations Act for fiscal year 1985, Pub.L. No. 98-473, 98 Stat. 1884, 1887-8 (1984).

the President's authority to adopt the Mexico City Policy. We do not agree.[9]

The foregoing amendments to the FAA and to the Appropriations Act for 1985, which restrict United States funding of abortion-related activity abroad, fall far short of evidencing a Congressional intent to require AID funding of foreign NGOs that perform or promote abortion. The FAA confers broad discretion on the President to disperse AID funds "on such terms and conditions as he may require." 22 U.S.C. § 2151b(b). The amendments to the FAA and any Appropriations Act language, therefore, must be construed in light of this unfettered discretion. *See Haig v. Agee*, 453 U.S. 280, 292, 101 S.Ct. 2766, 2774, 69 L.Ed.2d 640 (1981), quoting *Zemel v. Rusk*, 381 U.S. 1, 17, 85 S.Ct. 1271, 1281, 14 L.Ed.2d 179 (1965) ("Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas.") Congress has carefully tailored each amendment to withdraw from the President power to fund specific abortion-related activities. There is nothing in these provisions that prevents the President, in his discretion, from

9 Plaintiffs also argue that even if the President's statutory authority permits him to deny funds to foreign NGOs that perform or promote abortions, his decision to do so in this instance exceeded that authority. This is because, according to plaintiffs, the President adopted the Mexico City Policy, not for legitimate foreign policy purposes, but as part of a domestic political program.

The courts are not equipped to discern the legitimacy of Presidential motivation for adoption of policy decisions. Any attempt to assess such motivation would lead to an inevitable conflict between the courts and the Executive branch as the courts would be required to delve into the discussions, considerations, and decisions that are exclusively the province of the political branches. *See Winpisinger v. Watson*, 628 F.2d 133, 140 (D.C.Cir. 1980), *cert. denied*, 446 U.S. 929, 100 S.Ct. 1867, 64 L.Ed.2d 282 (1980). With respect to plaintiffs' claim of an illegitimate foreign policy purpose, we note in passing that not only was the Policy at issue presented to an International Conference on Population, but its principle, not to support abortion as a method of family planning was substantially adopted by the Conferees. Report of the International Conference on Population, 1984 Mexico, Recommendation 18(e) at 21.

further limiting United States support for abortion related activities by adopting the Mexico City Policy. Congress has not touched the Executive's overall discretion to advance population policies by favoring certain projects over others. Therefore, absent a specific limitation on the Executive's authority to condition dispersal of United States funds to foreign NGOs, it must be assumed the Congress has left intact his discretion to refuse to do so. *See Alan Guttmacher*, 616 F.Supp. 195, 209 ("It cannot be assumed from the Congressional action in 1973 and 1981 that Congress affirmatively intended the President to accept neutral, informational abortion-related research as a necessarily proper objective of § 2151b funds.") *See also Haig*, 453 U.S. at 292, 101 S.Ct. at 2774; *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 321, 57 S.Ct. 216, 221, 81 L.Ed. 255 (1936).

Indeed, our examination of the legislative history of the amendments to the FAA reveals that Congress has considered whether or not the United States should support foreign NGOs that perform or promote abortion, but has chosen not to interfere with Executive discretion in that area.[10] Most instructive is the reaction of Congress to the Executive's adoption of the Mexico City Policy. In 1984, as part of the Appropriations Act for 1985, the House of Representatives

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10 As early as 1973, when the Helms Amendment was adopted, Senator Helms noted that:

> We could, in fact, go far beyond the present amendment and require all abortion activities, from whatever funds, to be stopped before our assistance could be received. But the present amendment does not do that. It only requires that the United States does not participate in the spread of abortive practices.

119 Cong.Rec. S32293, daily ed., Oct. 1, 1973. The Conference Committee Report to the 1981 amendment to the FAA speaks of "necessary limits" provided by the Helms Amendment and the 1981 prohibition on biomedical research on abortion as a method of family planning. H.R.Conf.Rep. No. 413, 97th Cong., 1st Sess., 69, Pub.L. No. 97-113 (1981), U.S.Code Cong. & Admin.News 1981, p. 2404. Congress, thus, has provided *minimum* rather than *exclusive* limits on provision of federal aid to organizations that perform or promote abortion as a method of family planning.

adopted a "Sense of the House" condemning the Policy.[11] One year later, during consideration of the International Security and Development Cooperation Act of 1985, Pub.L. No. 99-83, 99 Stat. 190; the House of Representatives adopted an amendment endorsing the Policy. 131 Cong.Rec. H5348-H5355, daily ed., July 10, 1985.[12] Meanwhile, the Senate adopted an amendment to the statute prohibiting the Policy. S.Rep. No. 34, 99th Cong., 1st Sess., p. 32 (1985), U.S.Code Cong. & Admin.News 1985, p. 158.[13] In the Conference Committee both amendments were withdrawn as a compromise to the disparate House and Senate positions.[14] Thus, Congress, while adverting to the question, never acted to either approve or condemn the Mexico City Policy, but left the issue in the hands of the Executive. Accordingly, the Court concludes that the President did not exceed his authority under the FAA in adopting the Mexico City Policy and

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11 "It is further the sense of the House of Representatives that United States population assistance shall be administered in accordance with and faithful to these laws as interpreted by AID's 1982 'Policy Paper: Population Assistance' and that no funds shall be denied to multilateral as well as nongovernmental and private and voluntary organizations because of their participation, paid for by funds other than those appropriated by the Congress, in activities conducted in accordance with all applicable United States Federal laws and regulations." Foreign Assistance and Related Programs Appropriations Act for fiscal year 1985, Pub.L. No. 98-473, 98 Stat. 1884, 1888 (1984).

12 The House version permitted the President to "deny funds for population planning purposes . . . [to a foreign NGO] . . . because of the types of voluntary and coercive family planning programs which it carries out or promotes. . . ." 131 Cong.Rec. H5351, daily ed., July 10, 1985.

13 The Senate version stated:

> "In determining eligibility for assistance under this subsection, the administrator . . . shall not subject any nongovernmental or multilateral organization to any requirement more restrictive than any requirement applicable to a foreign government for such assistance." S. 960, 99th Cong. § 303(b) (1985).

14 "The conference substitute reflects the compromise agreed to by the conferees under which both the House and Senate recede from their positions." H.Conf.Rep. No. 237, 99th Cong., 1st Sess., 118, Pub.Law No. 99-83 (1985), U.S. Code Cong. & Admin. News 1985, p. 227.

that AID did not exceed its authority in conditioning receipt of AID funds upon compliance with the Standard Clause.[15] Thus, Count Three must be dismissed for failure to state a claim upon which relief can be granted.

2. Constitutional Claims

Counts One and Two of the Complaint allege that the Mexico City Policy and AID Standard Clause deny them First Amendment and privacy rights under the United States Constitution. Defendants move to dismiss these claims on the grounds that they challenge a foreign policy determination by the Executive branch and, therefore, the Court is presented with a non-justiciable political question. Plaintiffs, on the other hand, insist that they challenge not "the wisdom of foreign policy, which they agree is a matter for Congress and the President," but the constitutionality of the Clause, "as a means of implementing that policy." Plaintiff's Memorandum of Law at 22.

The starting point in assessing whether a controversy presents a non-justiciable political question is *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). In that case the Supreme Court articulated six categories into which political questions generally fall. The Court stated:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due co-ordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

15 The Court notes that Congress, following the extensive debates in 1984 and 1985 over the wisdom of the Mexico City Policy, has appropriated funds for AID three times. The Foreign Assistance Appropriations Act, Pub.Law 98-473, 98 Stat. 1837; the 1986 Foreign Assistance Appropriations Act, Pub.Law No. 99-190, 99 Stat. 1185, 1291-1295; and the 1987 Foreign Assistance Appropriations Act, Pub.Law 99-591, 100 Stat. 3341. Although Congress need not ratify the President's actions because they were authorized under the FAA, these appropriations, nevertheless, evidence Congressional consent thereto. *See DaCosta v. Laird*, 448 F.2d 1368, 1370 (2d Cir.1971), *cert. denied*, 405 U.S. 979, 92 S.Ct. 1193, 31 L.Ed.2d 255 (1972).

Id. at 217, 82 S.Ct. at 710.

If any one of the foregoing formulations is "inextricable from the case at bar" a non-justiciable political question is presented. *Id.*

In evaluating this case under the standard of *Baker v. Carr*, the Court must consider the nature of the case and the questions it raises. Initially, the Court notes that it falls into that category of cases, within the broader class of political question cases, which touch on the foreign policy of the United States.

It has long been held that questions directed to the foreign relations of the United States are subjects committed to the exclusive authority of the political branches of government. U.S. Const. Art. I, § 8; *Id.* Art. 2, § 2. *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302, 38 S.Ct. 309, 311, 62 L.Ed. 626 (1918) ("[t]he conduct of the foreign relations of our government is committed by the Constitution to the Executive and Legislative—'the political'—Departments . . ."); *See United States v. Curtis-Wright Corp.*, 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255 (1936); *Chicago and Southern Airlines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 113-14, 68 S.Ct. 431, 437, 92 L.Ed. 568 (1948); *Atlee v Laird*, 347 F.Supp. 689, 704-05 (E.D.Pa. 1972) (three-judge court), *aff'd sub nom. mem., Atlee v. Richardson*, 411 U.S. 911, 93 S.Ct. 1545, 36 L.Ed.2d 304 (1973). Frequently foreign policy decisions require the use of standards that the judiciary is ill-suited to formulate or to apply, or involve the exercise of discretion committed to a political branch or require a single-voiced statement of the Government's views. *Baker v. Carr*, 369 U.S. at 211, 82 S.Ct. at 707. As plaintiff rightly

points out, however, not "every case or controversy which touches foreign relations lies beyond judicial cognizance." *Id.* *See also Olegario v. United States*, 629 F.2d 204, 217 (2d Cir. 1980), *cert. denied*, 450 U.S. 980, 101 S.Ct. 1513, 67 L.Ed.2d 814 (1981).[16] A district court must determine whether the core issues challenge a foreign policy determination or raise questions of foreign policy not susceptible of judicial resolution or whether instead they challenge executive action which, while it may have foreign relations consequences, affects constitutional rights which are within the competence of the courts to determine. The Supreme Court has endorsed a case-by-case approach:

> Our cases in this field [of questions touching foreign relations] seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case and of the possible consequences of judicial action.

Id. at 211-12.

In this case the Complaint directly attacks the foreign policy of the United States and, in so doing, raises questions beyond the competence of the court. While plaintiffs have drafted it as a challenge to the AID Standard Clause and claim that the Clause infringes their First Amendment[17] and

16 Plaintiffs cite *Olegario* for the proposition that courts, which will not adjudicate the wisdom of foreign policy, nevertheless, will weigh foreign policy against constitutional standards. *Olegario*, however, assessed an alien's right to naturalization in light of the Executive's foreign policy decision 35 years earlier and is, thus, distinguishable from this case in which current foreign policy is at issue.

17 PPFA asserts that if the Standard Clause for foreign NGO's is given effect it will not be able to communicate to foreign NGO's its policy of "increas[ing] access to voluntary fertility regulation services, including legal abortion, through information and education, provision of medical services, commodity distribution and lobbying." (Comp. ¶ 16). It will be "prevented by U.S. Government action from associating . . . with many of the most logical and effective potential foreign partners because the policy will forbid

privacy rights, the relief they request, if granted, would nullify the Mexico City Policy denying United States assistance to foreign NGOs that perform or promote abortion[18] and plaintiffs leave no doubt that that is their objective. In addition, the Complaint seeks to invalidate AID's policy[19] requiring compliance with the Standard Clause not merely because it is statutorily and constitutionally infirm, but "because it is part of a long series of efforts by the Reagan administration to suppress views and activities related to the constitutional right of reproductive freedom." (Comp. ¶ 7; *see also* ¶ 3).[20]

those foreign [NGO's] from engaging in [abortion related] communication" (Comp. ¶ 54).

The court notes that the Standard Clause does not restrict PPFA, or other domestic NGO's which receive AID funds for transmittal to foreign NGO sub-recipients, from using their own non-U.S. sourced funds for any purpose, including the performance or promotion of abortion. (However, under the Standard Clause, this could not occur if the foreign NGO also chooses to receive U.S. funds). Thus, PPFA is free to engage in abortion advocacy activities abroad using its own employees, foreign NGO's, foreign governmental organizations or any means it chooses.

18 Plaintiffs seek (1) a declaratory judgment that the defendants' requirement that AID family planning fund recipients agree to the limits of the Standard Clause is "invalid and unenforceable;" (2) an injunction preventing defendants from further implementing the policy;" and (3) an injunction "prohibiting them from considering PPFA's views on abortion and reproductive rights in reviewing its [funding] application (Comp. ¶ 7).

19 The "policy" referred to in the Complaint has chameleon-like characteristics. In ¶ 29, it is the statement at Mexico City that the United States government "would no longer contribute to separate [NGO's] which perform or actively promote abortion as a method of family planning in other nations." In the request for relief, it becomes the "defendants' policy of requiring that recipients of AID family planning funds agree to the limits of the [Standard Clause]." (Comp., "Relief Sought," ¶ 1). This confusion, whether deliberate or not, further supports the Court's view that the Complaint seeks a court order freeing foreign NGO's and their intermediaries from the strictures of the Mexico City Policy statement set forth in ¶ 29.

20 The plaintiffs' request is consistent with their objective of obtaining judicial review of the Mexico City Policy itself. They seek documents from AID concerning "contacts" and "communications" with the White House, the Office of Management and Budget, Congress, with others in the State Department and with foreign officials, governments and nongovernmental

The Complaint is targeted not merely at a method or means of implementation of a foreign policy, but at the foreign policy itself. Since this is the case, we agree with defendants that the constitutional claims herein are non-justiciable.

It is clear to this Court that the fact finding necessary to resolve the questions raised in this case lacks "judicially discoverable and manageable standards." *Baker v. Carr*, 369 U.S. at 217, 82 S.Ct. at 710.[21] The Court would have to consider the alleged First Amendment and privacy right deprivations against the Executive's foreign policy determination not to grant financial assistance to foreign NGOs that perform or actively promote abortion as a method of family planning. The Court would become a forum for the plaintiffs to engage the political branches in debate on the wisdom of the eligibility policy and the proper distribution of population planning assistance funds in various foreign countries and would be required to render pronouncements on the soundness and importance of the Policy. Inquiry into the Executive's considerations[22] in establishing the foreign policy at issue thus would be necessary. For instance, we would need to address such questions as: (i) the principle the President wishes this policy to advance together with the benefits or the harm to the United States in advancing it; (ii) the importance of this

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organizations related to AID funding of PPFA, AID funding of organizations engaged in abortion or abortion related activities, the Mexico City Population Conference, "the reasons for; purposes of; consideration, drafting, approval and announcement of; legal authority for; possible effects of; and implementation of;" the Policy and the Standard Clause.

21 Plaintiffs contend that the issues presented in this case are "judicially discoverable and manageable," claiming that "the standards for deciding this case are the entirely manageable ones of the Bill of Rights, with which the Court is entirely familiar." Plaintiff's Memorandum of Law at 28. Plaintiffs seek to limit application of the second prong of *Baker v. Carr* to cases in which military issues are involved. We do not read the "judicially discoverable and manageable" standard so narrowly and we disagree with plaintiffs' characterization of the issues presented by this case.

22 The plaintiffs' document request makes clear that a searching inquiry into the executive's formulation of the Policy is essential to their case. *See* footnote 20, *supra*.

principle to the international community; and (iii) the policy's impact within each affected country, including upon that country's religious institutions, political factions and the government.

The courts are simply not equipped to assess the foreign policy implications of either the Mexico City Policy, or a judicial decision altering its terms, for example, in Catholic or Moslem countries or countries where abortion is illegal. Moreover, Executive decisions as to foreign policy are usually not susceptible to the sort of rational explanation that lies at the heart of the judicial process. Such judgments frequently result from a "feel of the situation" derived from an "understanding" of political, economic and social circumstances and sensitivities within the affected countries. As Justice Jackson has written:

> Such decisions are confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex and involve large elements of prophesy. They are and should be undertaken only by those responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry. [citations omitted].

Chicago and Southern Airlines, 333 U.S. at 111, 68 S.Ct. at 436.

Finally, any pronouncement by the Court that differed with the Executive on these foreign policy questions would undermine the credibility and effectiveness of the Executive Branch in its handling of this delicate foreign relations issue. Such a pronouncement would create the "potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker v. Carr*, 369 U.S. at 217, 82 S.Ct. at 710.[23]

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23 In *DKT Memorial Fund, Ltd. v. Agency for International Development*, 810 F.2d 1236 (D.C.Cir.1987), the Court of Appeals for the District of

The Court's view of this case receives support from the decision of the Second Circuit Court of Appeals in *DaCosta v. Laird*, 471 F.2d 1146 (2d Cir.1973), holding non-justiciable an inquiry into the propriety of the President's foreign affairs decision in May, 1972 to increase military activity against North Vietnam. Noting that it lacked the informational resources "to assess the nature of battlefield decisions," *DaCosta*, 471 F.2d at 1155, Judge Kaufman's opinion voiced his perplexity as to "how a court may decide a question when there are no judicially manageable standards for resolving it." *Id.* at 1153. *See also Holtzman v. Schlesinger*, 484 F.2d 1307, 1310 (2d Cir.1973), *cert. denied*, 416 U.S. 936, 94 S.Ct. 1935, 40 L.Ed.2d 286 (1974) ("We are not privy to the information supplied to the Executive by his professional and military diplomatic advisers and even if we were, we are hardly competent to evaluate it.") "The proper response in such situations is not to 'assume' the truth of the facts, but candidly to recognize that the court is incapable of assessing the facts and that the issue is therefore non-justiciable." *DaCosta*, 471 F.2d at 1155. This Court is similarly at a loss to see how it could obtain the relevant information upon which to act to resolve the foreign policy issues relating to the use of abortions in third world family planning. *See Crockett v. Reagan*, 558 F.Supp. 893, 898 (D.D.C.1982), *aff'd*, 720 F.2d 1355 (D.C.Cir.1983).

Also highly persuasive is the decision of Judge Edelstein in *Greenham Women Against Cruise Missiles v. Reagan*, 591 F.Supp. 1332 (S.D.N.Y.1984), *aff'd*, 755 F.2d 34 (2d

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Columbia read a complaint apparently similar to the one at bar and determined that it presented a justiciable "challenge [to] the legality of AID's implementation of the policy." *DKT Memorial Fund*, 810 F.2d at 1236. The discussion of the issue in a single paragraph of Judge Mikva's opinion sheds little light on contours of the complaint filed in that case. However, because the court relied solely upon *Population Institute v. McPherson*, 797 F.2d 1062 (D.C.Cir.1986), it appears that the court considered the *DKT Memorial Fund* case to be confined to the question of the AID administrator's statutory and administrative authority to act. In any event, this Court is not bound by *DKT Memorial Fund* and does not find it to be persuasive authority.

Cir.1985). In *Greenham Women*, plaintiffs sued to enjoin the deployment of cruise missiles at a United States Air Force Base in Greenham Common, Great Britain. Plaintiffs claimed infringement of constitutional rights under the Fifth and Ninth Amendments. The Court concluded that the case presented a non-justiciable political question because determination of the rights at issue would require the Court to evaluate the effect of cruise missile deployment on the foreign policy objectives of the United States. In language that, with slight modification, applies to this case, the court said:

> Undoubtedly it can be said that the President and Congress cannot "know" with an absolute degree of certainty the effects of missile deployment. But it is precisely because the ultimate effects are not altogether knowable that conjecture and predictions about them are best left to the political branches of government. Questions that are infinitely more complicated than those posed by the question "how many angels can dance on the head of a pin?" are not ready for ready answers. Questions like how to ensure peace, how to promote prosperity, what is a fair utilization and distribution of economic resources are examples of questions that must be decided by the fair, sound, seasoned and mature judgments of men and women responsive to the common good. The power to make these determinations is therefore appropriately allocated to the political branches.

Id. at 1338.

Impermissible judicial encroachment upon the power of the political branches can occur not only from the *act of resolving* a question whose nature is political, but also from the *consequences* that flow from judicial action. *Baker v. Carr* makes clear that the "discriminating analysis" to be utilized by courts where questions touch upon foreign relations is not confined to considerations relating to "the history of its management by the political branches" and "its susceptibility to judicial handling," but also encompasses "the possible consequences of judicial action." 369 U.S. at 211-12, 82 S.Ct. at

707. Just as a court must refrain from resolving a question whose nature is political, so must it refrain from adjudicating a claim where the relief sought would impermissibly intrude on the independence of the political branches.

The principal relief sought in this case is a declaratory judgment that AID's "policy of requiring that recipients of AID family planning funds agree to the limits of the Clause is invalid and unenforceable" (Comp. p. 32). Such relief would nullify AID's implementation and enforcement mechanism for the Mexico City Policy and render wholly unenforceable the foreign policy determination itself. It would amount to a ruling by this Court requiring the Executive to render financial assistance abroad to applicants whose activities are squarely in opposition to the announced foreign policy of the United States. A more direct or inappropriate interjection of the Court into the foreign policy function of the Executive can hardly be envisioned. *See Greenham Women*, 591 F.Supp. at 1339 ("It is difficult to imagine how the United States could influence the policies of foreign governments through diplomatic means if the actions of the political branches could be subject to public review and rejection by United States courts.")

Plaintiffs' reliance on cases where the Supreme Court and lower courts have reached the merits of issues touching upon the foreign affairs function of the political branches does not compel a conclusion of justiciability in this one. To be sure, the plaintiffs in these cases sought to vindicate individual rights that were affected by a decision connected to the foreign affairs function. However, in none of them did the court's inquiry necessitate a review of the merits of the foreign policy decision of the Executive or request relief that would nullify it. In each case, there were "judicially manageable standards" applicable to the specific determinations necessary to resolve the issues presented.

Ramirez de Arellano v. Weinberger, 745 F.2d 1500 (D.C.Cir. 1984), *vacated and remanded on other grounds*, 471 U.S. 1113, 105 S.Ct. 2353, 86 L.Ed.2d 255, *aff'd per curiam*, 788 F.2d 762 (D.C.Cir. 1986) casts this distinction in sharp relief. Ramirez, the owner of a large cattle ranch in

Honduras, challenged the occupation and destruction of his ranch by the United States during military maneuvers. He sought injunctive and declaratory relief, alleging that no statute or Constitutional provision authorized this action and, in addition, it violated his due process rights. The court concluded that Ramirez had presented a justiciable claim because he did not "seek to adjudicate the lawfulness of United States military presence abroad" but rather the "narrow issue whether the United States defendants may run military exercises through the plaintiff's private pastures when their land has not been lawfully expropriated." *Ramirez*, 745 F.2d at 1512. Thus, the factual issues presented in *Ramirez*, unlike those raised in this case, were of the type traditionally adjudicated in the courts. *See Olegario*, 629 F.2d at 217. For similar cases, *see also Kleindienst v. Mandel*, 408 U.S. 753, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972); *Zemel v. Rusk*, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965); *Haig v. Agee*, 453 U.S. 280, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981); *Regan v. Wald*, 468 U.S. 222, 104 S.Ct. 3026, 82 L.Ed.2d 171 (1984); *Lamont v. Postmaster General of the United States*, 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed.2d 398 (1965); *Reid v. Covert*, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957); *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) and *INS v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). Plaintiffs in this case have not confined their complaint to a "narrow issue" dealing with individual rights but have mounted a broad challenge seeking the annulment of Presidential foreign policy which is beyond the competence of the Court to determine.

Conclusion

The defendants are acting within their statutory and administrative authority in requiring recipients of foreign assistance for family planning to agree to the limits of the Standard Clause to the effect that no such funds may be furnished to foreign non-governmental organizations that perform or actively promote abortion as a method of family

planning. The constitutional claims of plaintiffs are non-justiciable. It is unnecessary for this Court to consider whether the plaintiffs or any of them lack standing to maintain the action. Defendants' motion to dismiss the complaint is hereby granted.

SO ORDERED.

OMB Approval No. 12-0510
Expiration Date 1/31/87

STANDARD PROVISION TO BE USED IN GRANTS AND COOPERATE AGREEMENTS WITH U.S. NONGOVERNMENTAL ORGANIZATIONS

VOLUNTARY POPULATION PLANNING (JULY 1985)

(This provision is applicable to all grants involving any aspect of voluntary population planning activities.)

(a) *Voluntary Participation*

The grantee agrees to take any steps necessary to ensure that funds made available under this grant will not be used to coerce any individual to practice methods of family planning inconsistent with such individual's moral, philosophical, or religious beliefs. Further, the grantee agrees to conduct its activities in a manner which safeguards the rights, health and welfare of all individuals who take part in the program.

(b) *Voluntary Participation Requirements For Sterilization Programs*

(1) None of the funds made available under this grant shall be used to pay for the performance of involuntary sterilization as a method of family planning or to coerce or provide any financial incentive to any person to practice sterilization.

(2) The grantee shall ensure that any surgical sterilization procedures supported in whole or in part by funds from this grant are performed only after the individual has voluntarily gone to the treatment facility and has given informed concent to the sterilization procedure. Informed consent means the voluntary, knowing assent from the individual after being advised of the surgical procedures to be followed, the attendant discomforts and risks, the benefits to be expected, the availability of alternative methods of family planning, the purpose of the operation and its irreversibility, and the option to withdraw consent anytime prior to the operation.

An individual's consent is considered voluntary if it is based upon the exercise of free choice and is not obtained by any special inducement or any element of force, fraud, deceit, duress, or other forms of coercion or misrepresentation.

(3) Further, the grantee shall document the patient's informed consent by (i) a written consent document in a language the patient understands and speaks, which explains the basic elements of informed consent, as set out above, and which is signed by the individual and by the attending physician or by the authorized assistant of the attending physician; or (ii) when a patient is unable to read adequately a written certification by the attending physician or by the authorized assistant of the attending physician that the basic elements of informed consent above were orally presented to the patient, and that the patient thereafter consented to the performance of the operation. The receipt of the oral explanation shall be acknowledged by the patient's mark on the certification and by the signature or mark of a witness who shall be of the same sex and speak the same language as the patient.

(4) Copies of informed consent forms and certification documents for each voluntary sterilization procedures must be retained by the grantee for a period of three years after performance of the sterilization procedure.

(c) *Prohibition on Abortion-Related Activities*

(1) No funds made available under this grant will be used to finance, support, or be attributed to the following activities: (i) procurement or distribution of equipment intended to be used for the purpose of inducing abortions as a method of family planning; (ii) special fees or incentives to women to coerce or motivate them to have abortions; (iii) payments to persons to perform abortions or to solicit persons to undergo abortions; (iv) information, education, training, or communication programs that seek to promote abortion as a method of family planning; and (v) lobbying for abortion.

(2) No funds made available under this grant will be used to pay for any biomedical research which relates, in whole or

in part, to methods of, or the performance of, abortions or involuntary sterilizations as a means of family planning. Epidemiologic or descriptive research to assess the incidence, extent or consequences of abortions is not precluded.

(d) *Ineligibility of Foreign Nongovernmental Organizations That Perform or Actively Promote Abortion As A Method of Family Planning:*

(1) The recipient agrees that it will not furnish assistance under this grant to any foreign nongovernmental organization which performs or actively promotes abortion as a method of family planning in AID-recipient countries or which provides financial support to any other foreign nongovernmental organization that conducts such activities. For purpose of this paragraph (d), a foreign nongovernmental organization is a nongovernmental organization which is not organized under the laws of any State of the United States, the District of Columbia or the Commonwealth of Puerto Rico.

(2) Prior to furnishing funds provided under this grant to another nongovernmental organization organized under the laws of any State of the United States, the District of Columbia, or the Commonwealth of Puerto Rico, the recipient shall obtain the written agreement of such organization that the organization shall not furnish assistance under this grant to any foreign nongovernmental organization except under the conditions and requirements that are applicable to the recipient as set forth in this paragraph (d).

(3) The recipient may not furnish assistance under this grant to a foreign nongovernmental organization (the subrecipient) unless;

(i) the subrecipient certifies in writing that it does not perform or actively promote abortion as a method of family planning in AID-recipient countries and does not provide financial support to any other foreign nongovernmental organization that conducts such activities, and

(ii) the recipient obtains the written agreement of the subrecipient containing the undertakings described in subparagraph (4), below.

(4) Prior to furnishing assistance under this grant to a subrecipient, the subrecipient must agree in writing that;

(i) The subrecipient will not, while receiving assistance under this grant, perform or actively promote abortion as a method of family planning AID-recipient countries or provide financial support to other foreign nongovernmental organizations that conduct such activities.

(ii) The recipient and authorized representatives of AID may, at any reasonable time, (A) inspect the documents and materials maintained or prepared by the subrecipient in the usual course of its operations that describe the family planning activities of the subrecipient, including reports, brochures and service statistics; (B) observe the family planning activity conducted by the subrecipient; (C) consult with family planning personnel of the subrecipient; and (D) obtain a copy of the audited financial statement or report of the subrecipient, if there is one.

(iii) In the event the recipient or AID has reasonable cause to believe that a subrecipient may have violated its undertaking not to perform or actively promote abortion as a method of family planning, the recipient shall review the family planning program of the subrecipient to determine whether a violation of the undertaking has occurred. The subrecipient shall make available to the recipient such books and records and other information as may be reasonably requested in order to conduct the review. AID may also review the family planning program of the subrecipient under these circumstances, and AID shall have access to such books and records and information for inspection upon request.

(iv) The subrecipient shall refund to the recipient the entire amount of assistance furnished to the subrecipient under this grant in the event it is determined that the certification provided by the subrecipient under subparagraph (3), above, is false.

(v) Assistance to the subrecipient under this grant shall be terminated if the subrecipient violates any undertaking in the agreement required by subparagraphs (3) and (4), and the subrecipient shall refund to the recipient the value of any assistance furnished under this grant that is used to perform or actively promote abortion as a method of family planning.

(vi) The subrecipient may furnish assistance under this grant to another foreign nongovernmental organization (the sub-subrecipient) only if (A) the sub-subrecipient certifies in writing that it does not perform or actively promote abortion as a method of family planning in AID-recipient countries and does not provide financial support to any other foreign nongovernmental organization that conducts such activities and (B) the subrecipient obtains the written agreement of the sub-subrecipient that contains the same undertakings and obligations to the subrecipient as those provided by the subrecipient to the recipient as described in subparagraphs (4)(i)-(v), above.

(5) Agreements with subrecipients and sub-subrecipients required under subparagraphs (3) and (4) shall contain the definitions set forth in subparagraph (10) of this paragraph (d).

(6) The recipient shall be liable to AID for a refund for a violation of any requirement of this paragraph (d) only if (i) the recipient knowingly furnishes assistance to a subrecipient which performs or actively promotes abortion as a method of family planning, or (ii) the certification provided by a subrecipient is false and the recipient failed to make reasonable efforts to verify the validity of the certification prior to furnishing assistance to the subrecipient, or (iii) the recipient knows or has reason to know, by virtue of the monitoring which the recipient is required to perform under the terms of this grant, that a subrecipient has violated any of the undertakings required under subparagraph (4) and the recipient fails to terminate assistance to the subrecipient, or fails to require the subrecipient to terminate assistance to a sub-subrecipient which violates any undertaking of the agreement

required under subparagraph (4)(vi), above. If the recipient finds, in exercising its monitoring responsibility under this grant, that a subrecipient or sub-subrecipient receives frequent requests for the information described in subparagraph (10)(iii)(A)(II), below, the recipient shall verify that this information is being provided properly in accordance with subparagraph (10)(iii)(A)(II) and shall describe to AID the reasons for reaching its conclusion.

(7) In submitting a request to AID for approval of a recipient's decision to furnish assistance to as subrecipient, the recipient shall include a description of the efforts made by the recipient to verify the validity of the certification provided by the subrecipient. AID may request the recipient to make additional efforts to verify the validity of the certification. AID will inform the recipient in writing when AID is satisfied that reasonable efforts have been made. If AID concludes that these efforts are reasonable within the meaning of subparagraph (6) above, the recipient shall not be liable to AID for a refund in the event the subrecipient's certification is false ~~unless the r~~ecipient knew the certification to be false or misrepresented to AID the efforts made by the recipient to verify the validity of the certification.

(8) It is understood that AID also may make independent inquiries, in the community served by a subrecipient or sub-subrecipient, regarding whether it performs or actively promotes abortion as a method of family planning.

(9) A subrecipient must provide the certification required under subparagraph (3) and a sub-subrecipient must provide the certification required under subparagraph (4)(vi) each time a new agreement is executed with the subrecipient or sub-subrecipient furnishing assistance under the grant.

(10) The following definitions apply for purposes of this paragraph (d):

(i) Abortion is a method of family planning when it is for the purpose of spacing births. This includes, but is not limited to, abortions performed for the physical or mental health of the mother but does not include abortions performed if the life of the mother would be endangered if the fetus were carried to term or abortions performed following rape or incest (since abortion under these circumstances is not a family planning act).

(ii) To perform abortions means to operate a facility where abortions are performed as a method of family planning. Excluded from this definition are clinics or hospitals which do not include abortion in their family planning programs.

(iii) To actively promote abortion means for an organization to commit resources, financial or other, in a substantial or continuing effort to increase the availability or use of abortion as a method of family planning.

(A) This includes, but is not limited to, the following:

(I) Operating a family planning counseling service that includes, as part of the regular program, providing advice and information regarding the benefits and availability of abortion as a method of family planning;

(II) providing advice that abortion is an available option in the event other methods of family planning are not used or are not successful or encouraging women to consider abortion (passively responding to a question regarding where a safe, legal abortion may be obtained is not considered active promotion if the question is specifically asked by a women who is already pregnant, the women clearly states that she has already decided to have a legal abortion, and the family planning counsellor reasonably believes that the ethics of the medical profession in the country requires a response regarding where it may be obtained safely);

(III) Lobbying a foreign government to legalize or make available abortion as a method of family planning or lobbying such a government to continue the legality of abortion as a method of family planning;

(IV) Conducting a public information campaign in AID-recipient countries regarding the benefits and/or availability of abortion as a method of family planning.

(B) Excluded from the definition of active promotion of abortion as a method of family planning are referrals for abortion as a result of rape, incest or if the life of the mother would be endangered if the fetus were carried to term.

(C) Action by an individual acting in the individual's capacity shall not be attributed to an organization with which the individual is associated, provided that the organization neither endorses nor provides financial support for the action and takes reasonable steps to ensure that the individual does not improperly represent that the individual is acting on behalf of the organization.

(iv) To furnish assistance to a foreign nongovernmental organization means to provide financial support under this grant to the family planning program of the organization, and includes the transfer of funds made available under this grant or goods or services financed with such funds, but does not include the purchase of goods or services from an organization or the participation of an individual in the general training programs of the recipient, subrecipient or sub-subrecipient.

(v) To control an organization means the possession of the power to direct or cause the direction of the management and policies of an organization.

(11) In determining whether a foreign nongovernmental organization is eligible to be a subrecipient or sub-subrecipient of assistance under this grant, the action of separate nongovernmental organizations shall not be imputed to the subrecipient or sub-subrecipient, unless, in the judgment of AID, a separate nongovernmental organization is being used as a sham to avoid the restrictions of this paragraph (d). Separate nongovernmental organizations are those that have distinct legal existence in accordance with the laws of the countries in which they are organized. Foreign organizations that are separately organized shall not be considered separate, however, if one is controlled by the other. The recipient may request AID's approval to treat as separate the family planning activities of two or more organizations, which would not

be considered separate under the preceding sentence, if the recipient believes, and provides a written justification to AID therefor, that the family planning activities of the organizations are sufficiently distinct as to warrant not imputing the activity of one to the other.

(12) Assistance may be furnished under this grant by a recipient, subrecipient or sub-subrecipient to a foreign government even though the government includes abortion in its family planning program, provided that no assistance may be furnished in support of the abortion activity of the government and any funds transferred to the government shall be placed in a segregated account to ensure that such funds may not be used to support the abortion activity of the government.

(e) The grantee shall insert this provision, except paragraph (d), in all subsequent subgrants and contracts involving family planning or population activities which will be supported in whole or part from funds under this grant. Paragraph (d) shall be inserted in subagreements and sub-subagreements in accordance with the terms of paragraph (d). The term subagreement means subgrants and sub-cooperative agreements.

UNITED STATES CONSTITUTION

AMENDMENT I [1791]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT IX [1791]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

§ 2151b. Population planning and health programs

(a) Congressional declaration of policy

The Congress recognizes that poor health conditions and uncontrolled population growth can vitiate otherwise successful development efforts.

Large families in developing countries are the result of complex social and economic factors which change relatively slowly among the poor majority least affected by economic progress, as well as the result of a lack of effective birth control. Therefore, effective family planning depends upon economic and social change as well as the delivery of services and is often a matter of political and religious sensitivity. While every country has the right to determine its own policies with respect to population growth, voluntary population planning programs can make a substantial contribution to economic development, higher living standards, and improved health and nutrition.

Good health conditions are a principal element in improved quality of life and contribute to the individual's capacity to participate in the development process, while poor health and debilitating disease can limit productivity.

(b) Assistance for voluntary population planning

In order to increase the opportunities and motivation for family planning and to reduce the rate of population growth, the President is authorized to furnish assistance, on such terms and conditions as he may determine, for voluntary population planning. In addition to the provision of family planning information and services, including also information and services which relate to and support natural family planning methods, and the conduct of directly relevant demographic research, population planning programs shall emphasize motivation for small families.

* * *

(f) Prohibition on use of funds for performance or research respecting abortions or involuntary sterilization

(1) None of the funds made available to carry out subchapter I of this chapter may be used to pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions.

(2) None of the funds made available to carry out subchapter I of this chapter may be used to pay for the performance of involuntary sterilizations as a method of family planning or to coerce or provide any financial incentive to any person to undergo sterilizations.

(3) None of the funds made available to carry out subchapter I of this chapter may be used to pay for any biomedical research which relates, in whole or in part, to methods of, or the performance of, abortions or involuntary sterilization as a means of family planning.

* * *

§ 2151u. Private and voluntary organizations and cooperatives in overseas development

(a) Congressional finding of importance of participation by private and voluntary organizations

The Congress finds that the participation of rural and urban poor people in their countries' development can be assisted and accelerated in an effective manner through an increase in activities planned and carried out by private and voluntary organizations and cooperatives. Such organizations and cooperatives, embodying the American spirit of self-help and assistance to others to improve their lives and incomes, constitute an important means of mobilizing private American financial and human resources to benefit poor people in developing countries. The Congress declares that it is in the interest of the United States that such organizations and cooperatives expand their overseas development efforts without compromising their private and independent nature. The

Congress further declares that the financial resources of such organizations and cooperatives should be supplemented by the contribution of public funds for the purpose of undertaking development activities in accordance with the principles set forth in section 2151-1 of this title and, if necessary and determined on a case-by-case basis, for the purpose of sharing the cost of developing programs related to such activities. The Congress urges the Administrator of the agency primarily responsible for administering subchapter I of this chapter, in implementing programs authorized under subchapter I of this chapter, to draw on the resource of private and voluntary organizations and cooperatives to plan and carry out development activities and to establish simplified procedures for the development and approval of programs to be carried out by such private and voluntary organizations and cooperatives as have demonstrated a capacity to undertake effective development activities.

(2)

No. 90-1169

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In the Supreme Court of the United States

OCTOBER TERM, 1990

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., ET AL., PETITIONERS

v.

AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Agency for International Development's (AID's) requirement that its domestic grantees agree not to sub-grant AID funds to foreign non-governmental organizations that perform or actively promote abortion as a method of family planning violates the First Amendment.

2. Whether AID's limitation on the sub-granting of AID funds conflicts with statutory limitations on the use of federal funds for abortion-related activities abroad.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-16a, 33a-49a) are reported at 915 F.2d 59 and 838 F.2d 649. The first opinion of the district court (Pet. App. 50a-74a) is reported at 670 F. Supp. 538. The second opinion of the district court (Pet. App. 17a-32a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1990. On November 30, 1990, Justice Marshall extended the time for filing a petition for a writ of certiorari to and including January 17, 1991, and the petition was filed on that date. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Foreign Assistance Act of 1961, 22 U.S.C. 2151 *et seq.*, authorizes the President "to furnish assistance, on such terms and conditions as he may determine, for voluntary population planning." 22 U.S.C. 2151b(b). The Act further provides, however, that funds provided by the United States may not "be used to pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions [*sic*]." 22 U.S.C. 2151b(f).

In 1984, the President announced his policy (known as the Mexico City Policy) with regard to voluntary population planning assistance and abortion, which states in relevant part:

> The United Nations Declaration of the Rights of the Child [1959] calls for legal protection for children before birth as well as after birth. In keeping with this obligation, the United States does not consider abortion an acceptable element of family planning programs and will no longer contribute to those of which it is a part. Accordingly, when dealing with nations which support abortion with funds not provided by the United States Government, the United States will contribute to such nations through segregated accounts which cannot be used for abortion. Moreover, the United States will no longer contribute to separate non- governmental organizations which perform or actively promote abortion as a method of family planning in other nations. * * *

Statement of the United States of America at the United Nations International Conference on Population (Second Session), Mexico, D. F., August 6-13, 1984. Pet. App. 4a-5a, 53a-55a.

2. The Agency for International Development (AID) administers grants provided under the Foreign Assistance Act, including grants and cooperative agreements to carry out population planning programs abroad. AID disperses the funds to domestic non-governmental organizations (NGOs), such as petitioner Planned Parenthood Federation of America, Inc. (PPFA), that then sub-grant the AID funds to foreign NGOs for family planning projects in foreign countries. Pet. App. 52a-53a.

Since 1985, AID population planning grants and cooperative agreements have contained a clause, captioned the "Standard Provision to be Used in Grants and Cooperative Agreements with U.S. Nongovernmental Organizations" (the Standard Clause), that implements the President's Mexico City Policy through specific eligibility provisions. Pet. App. 55a. The Standard Clause requires domestic NGOs to agree that they will not sub-grant AID funds to foreign NGOs that perform or actively promote abortion as a method of family planning abroad. Pet. App. 77a.[1] Domestic NGOs are not prohibited, as a condition

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[1] Under the Standard Clause, abortion "is a method of family planning when it is for the purpose of spacing births." Pet. App. 80a. This "does not include abortions performed if the life of the mother would be endangered if the fetus were carried to term or abortions performed following rape or incest," nor does it include "referrals" for abortion in those circumstances. *Id.* at 80a-81a. The Standard Clause also states that "passively responding to a question regarding where a safe, legal abortion may be obtained is not considered active promotion if the question is specifically asked by a woman who is already pregnant, the woman clearly states that she has already decided to have a legal abortion, and the family planning counselor reasonably believes that the ethics of the medical profession in the country requires a response regarding where it may be obtained safely." *Id.* at 81a. A similar clause requires foreign NGOs that are direct AID grantees to certify that they will not engage in abortion activities while receiving AID funds. *Id.* at 19a.

of receiving AID grant funds, from using non-AID funds to perform abortions or actively to promote abortion as a method of family planning abroad, or from sub-granting non-AID funds to foreign NGOs that engage in those activities. *Id.* at 6a-7a.

3. Prior to the announcement of the Mexico City Policy, AID and PPFA had entered into a cooperative agreement, scheduled to expire on December 31, 1987, that entitled PPFA to sub-grant AID funds to foreign NGOs. On January 13, 1987, petitioners filed a complaint for declaratory and injunctive relief to prevent implementation of the Standard Clause as part of PPFA's new cooperative agreement with AID. Pet. App. 21a. They contended that implementation of the Clause was contrary to the Foreign Assistance Act and violated their constitutional rights to speech, association, and privacy. *Id.* at 21a-23a. The district court dismissed the complaint, holding that implementation of the Mexico City Policy was authorized by statute and that the constitutional issues raised by petitioners were nonjusticiable "political" questions. *Id.* at 50a-74a. The court of appeals affirmed the district court's statutory holding, but reversed the holding that petitioners' constitutional claims were nonjusticiable and remanded for further proceedings. *Id.* at 33a-49a.[2]

[2] Because PPFA's 1983 cooperative agreement with AID was due to expire, AID gave PPFA a short extension to phase out its funded programs while petitioners' appeal was pending. Pet. App. 20a n. 2. On remand, the parties negotiated a stipulation, approved by the district court, requiring AID to provide continued federal assistance to PPFA for the programs covered by the 1983 cooperative agreement without requiring PPFA to abide by the Standard Clause. *Ibid.* AID reserved its right, however, to enforce the Mexico City Policy by means other than the Standard Clause, and PPFA agreed to obtain AID's approval of every sub-grant of AID funds, which AID could withhold in its discretion.

4. On remand, the district court again dismissed the complaint. Pet. App. 17a-32a. The court stated that, even assuming *arguendo* that the Standard Clause infringed petitioners' First Amendment rights of speech and association and could be sustained only if it passed the "strict scrutiny" test of *Roberts* v. *United States Jaycees*, 468 U.S. 609, 623 (1984) and *United States* v. *O'Brien*, 391 U.S. 367 (1968), the Standard Clause satisfied that test because it was necessary to serve the substantial governmental interest set forth in the President's Mexico City Policy and it was the least restrictive means of implementing that policy. Pet. App. 26a-30a. The district court also held that because the Standard Clause did not place any affirmative legal obstacles in the path of American citizens who sought abortion-related advice from health care facilities abroad, it did not violate the claimed constitutional right of privacy of petitioner Jane Doe, who sought such advice from an AID-funded facility in Nigeria. *Id.* at 30a-32a.[3]

5. The court of appeals affirmed the district court's second decision. Pet. App. 1a-16a. The court held that the Standard Clause "does not prohibit [petitioners] from exercising their first amendment rights," but simply denies them a federal subsidy for the exercise of those rights. *Id.* at 10a-11a. Under the Standard Clause, petitioners could

[3] On April 30, 1990, after the district court dismissed the complaint, AID gave PPFA written notice that AID was terminating the 1983 cooperative agreement because PPFA's operations under that agreement were no longer consistent with AID's program. AID provided PPFA with a phase-out schedule for its current projects under which funding for all projects would cease by October 31, 1990. See Pet. App. 6a. AID invited PPFA, however, to apply for a new cooperative agreement that would begin November 1, 1990, and AID outlined substantive program changes that would have to be incorporated in such an agreement. PPFA submitted a revised application for a new cooperative agreement on August 29, 1990.

"use their own funds to pursue whatever abortion-related activities they wish in foreign countries." *Id.* at 11a. Indeed, PPFA could "grant AID funds to a foreign NGO for all aspects of family planning except abortion and * * * use its own funds to establish an abortion-related facility next door." *Ibid.*

The court of appeals recognized, as petitioners alleged, that the Standard Clause imposed foreign aid restrictions that could discourage foreign NGOs from working with petitioners on abortion-related projects. As the court explained, however, any consequent harm to petitioners "is the result of choices made by foreign NGOs to take AID's money rather than engage in non-AID funded cooperative efforts with [petitioners]." Pet. App. 11a. "Such an incidental effect from the refusal to subsidize the exercise of a constitutional right obviously is not what the Supreme Court considers an 'obstacle in the path' of plaintiffs seeking to exercise the right." *Id.* at 12a.

The court of appeals also rejected petitioners' contention that the Standard Clause imposes an "unconstitutional condition" on the receipt of federal funds. Pet. App. 12a. Unlike the plaintiff in *Perry* v. *Sindermann*, 408 U.S. 593 (1972), who "was forced to choose between his employment and his right to freedom of speech," PPFA "may continue to participate as a conduit for AID funds that are restricted to non-abortion activities while maintaining with [its] own funds abortion-related activities in the same countries." Pet. App. 12a-13a. The court of appeals observed that "the wisdom of, and motivation behind" the President's Mexico City Policy "are not justiciable issues," *id.* at 13a, and that the Standard Clause "must be upheld if rationally related to [the President's] policy goal," *id.* at 14a. The court concluded that the Standard Clause, which "goes no further than necessary to implement an otherwise nonjusticiable

decision limiting the class of beneficiaries of foreign aid," *ibid.*, satisfies that test. *Id.* at 15a.

Finally, the court of appeals rejected the argument of individual petitioner Jane Doe that the Standard Clause violates her claimed constitutional right of privacy by preventing her from receiving abortion information at an AID-funded clinic in Nigeria. Pet. App. 15a. The court of appeals pointed out that the Standard Clause would not prevent Doe from obtaining non-abortion services at an AID-funded clinic and abortion services at a non-AID-funded clinic. Moreover, the Standard Clause would not prevent Doe's physician from working at an AID-funded clinic even if he or she performs or actively promotes abortion at a facility unrelated to that clinic. *Id.* at 15a-16a.[4]

ARGUMENT

The court of appeals' decision breaks no new constitutional ground. The court simply applied settled principles enunciated by this Court in *Lyng* v. *International Union, Automobile Workers*, 485 U.S. 360 (1988), and *Regan* v. *Taxation with Representation*, 461 U.S. 540 (1983), which hold that the government is under no obligation to subsidize the exercise of a fundamental right. The court of appeals' decision does not conflict with any decision of this Court or another court of appeals. Rather, the court's constitutional holding is consistent with *Pathfinder Fund* v. *AID*,

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[4] Thereafter, AID informed PPFA it had tentatively budgeted between $3 million and $4 million to support PPFA projects during fiscal year 1991 under a new cooperative agreement containing the Standard Clause. PPFA refused to sign the agreement (Pet. 3 n.3) and sought interim relief to compel AID to provide continued funding for 33 projects under the 1983 cooperative agreement. The court of appeals denied the requested relief on October 10, 1990, and this Court denied a similar request on October 29, 1990. 111 S. Ct. 335 (No. A-300).

746 F. Supp. 192 (D.D.C. 1990), appeal held in abeyance, No. 90-5388 (D.C. Cir. Feb. 22, 1991), and its statutory holding, also challenged by petitioners, is consistent with *DKT Memorial Fund* v. *AID*, 887 F.2d 275 (D.C. Cir. 1989). Additionally, the decision involves only federal grants for population planning activities in foreign countries. Further review, accordingly, is unwarranted.

1. Petitioners primarily argue (Pet. 9-20) that the Standard Clause violates the First Amendment by limiting their rights of speech and association. There is no merit to that claim. As the court of appeals explained, the Standard Clause prevents PPFA from sub-granting AID funds to foreign NGOs that perform or actively promote abortions as a method of family planning. The Clause does not prevent PPFA or its members from associating with or providing non-AID funds to those organizations. Petitioners may find that they have fewer opportunities to associate with foreign NGOs if PPFA cannot provide AID funds to organizations that perform or promote abortions, but that is simply an incidental effect of the government's decision against subsidizing the activities of abortion advocates in foreign countries.

Petitioners contend (Pet. 11-14) that the injuries they allege are not "incidental," citing *Bantam Books* v. *Sullivan*, 372 U.S. 58 (1963), *Bates* v. *City of Little Rock*, 361 U.S. 516 (1960), and *NAACP* v. *Alabama*, 357 U.S. 449 (1958). None of those cases, however, involved a government decision not to subsidize a particular activity.[5] As this Court

[5] In *Bantam Books*, four publishers challenged the State's practice of intimidating their distributors by notifying them that the publishers' books were "objectionable" and could result in an obscenity prosecution. See 372 U.S. at 61-64. In *Bates* and *NAACP*, government officials attempted, through criminal and contempt sanctions, to coerce the NAACP to disclose its membership list. 361 U.S. at 517; 357 U.S. at 451.

recognized in *Lyng* v. *International Union*, a government decision not to subsidize a given activity "has no unconstitutional impact on the right of individuals to associate for various purposes." 485 U.S. at 366. The same is true here. This Court made clear in *Lyng* that freedom of association is infringed by a government restriction only if that restriction "directly and substantially" interferes with the ability to associate by "order[ing]" people not to associate together, by "prevent[ing]" them from associating together, or by "burden[ing]" their ability to do so "in any significant manner." *Ibid.* The Standard Clause does none of those things. See also, *e.g.*, *Regan* v. *Taxation with Representation*, 461 U.S. 540, 549 (1983) ("a legislature's decision not to subsidize the exercise of a fundamental right does not infringe that right").[6]

Petitioners assert (15-17) that the court of appeals' treatment of the Standard Clause as a "mere refusal to subsidize" is a mischaracterization because the Standard Clause denies a federal subsidy to a foreign NGO that performs or actively promotes abortion even if the foreign NGO conducts those activities with non-federal funds. The question here, however, is how the Standard Clause affects *petitioners'* asserted rights.[7] See *Powers* v. *Ohio*, No. 89-5011 (Apr. 1, 1991), slip op. 10. The Standard Clause simply imposes

[6] Petitioners mistakenly rely (Pet. 13-14) on *Meyer* v. *Grant*, 486 U.S. 414 (1988), and other cases requiring "strict scrutiny" when government restrictions ostensibly aimed at conduct in fact seek to suppress expression. The Standard Clause does not limit either expression or association by petitioners; they are free to speak about and use non-AID funds to promote abortion as a method of family planning abroad by themselves or in concert with any foreign NGOs they choose.

[7] It is doubtful (but not material to the disposition of this petition) whether a foreign entity operating abroad can assert a First Amendment right. Cf. *United States* v. *Verdugo-Urquidez*, 110 S. Ct. 1056 (1990).

a condition on PPFA's use of federally granted funds—it cannot sub-grant them to foreign NGOs that perform or promote abortions. It does not prevent PPFA from continuing to advocate abortion or from subsidizing foreign NGOs with non-federal funds. The government's restriction in this case, like the government's refusal in *Lyng* to give food stamps to striking workers, is simply a "refusal to subsidize" a particular activity.[8]

2. Petitioners contend (Pet. 20-22) that the Standard Clause also "interferes with the right of American women overseas, such as [Jane] Doe, to make fully informed choices about contraception and child-bearing without censorship imposed by the American government." Nothing in the Standard Clause, however, prevents Jane Doe in Nigeria or other American women residing overseas from seeking information about abortion from the many non-AID funded health clinics that exist. It may be that certain foreign NGOs do not provide that information because they have determined that they would rather receive AID funds than provide or actively promote abortion services, but that is a consequence of the foreign NGO's free choice. The United States' refusal to subsidize foreign NGOs that provide abortions does not prevent a woman from, or penalize her for,

[8] Petitioners also argue that "the exercise of foreign policy is not automatically immune from strict scrutiny" (Pet. 17). The court of appeals, however, did not refuse to apply "strict scrutiny" because the Standard Clause involved foreign policy; instead, it refused to apply strict scrutiny because, as in *Lyng*, 485 U.S. at 370, no fundamental interest was at stake. Pet. App. 12a. Petitioners rely on various statements from the court of appeals' opinion indicating the court's reluctance to second-guess foreign policy judgments (Pet. 17-18). The court made those statements, however, in support of its conclusion that the "wisdom of, and motivation behind," the Mexico Policy Statement is not justiciable—not in respect to the constitutionality of the Standard Clause, which the court concluded is subject to judicial review. Pet. App. 13a-14a.

seeking out a health care provider that elects to provide abortion services. See Pet. App. 15a-16a.

3. Petitioners next argue (Pet. 22-24) that the Standard Clause violates the First Amendment because it requires PPFA "to espouse and circulate particular ideas—ideas that it finds repellent." This argument is devoid of merit. The Standard Clause simply restricts the sub-granting of AID funds; it does not compel PPFA to espouse any particular ideas. If PPFA objects to sub-granting AID funds only to foreign NGOs that do not perform or actively promote abortion, it can simply decline to participate in the AID voluntary population planning program. It has no right to insist in court that a government program in which it does not wish to participate be changed into the type of program in which it would like to participate. Whether PPFA chooses to participate or not, PPFA remains free, apart from the sub-granting of federal funds, to espouse whatever beliefs it chooses concerning abortion.

4. Finally, petitioners are mistaken in asserting (Pet. 25-28) that the Standard Clause is inconsistent with the Foreign Assistance Act. As the court of appeals recognized, the Foreign Assistance Act gives the President broad discretion "to furnish assistance, on such terms and conditions as he may determine, for voluntary population planning." 22 U.S.C. 2151b(b). The President's Mexico City Policy is an appropriate exercise of his authority. The Standard Clause, which implements that policy, is consistent with the Act's only relevant limitation—that foreign assistance funds may not "be used to pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions." 22 U.S.C. 2151b(f).

Contrary to petitioners' assertion (Pet. 25), the court of appeals did not disregard this Court's dictum that "[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Worsted*

Mills v. *United States*, 278 U.S. 282, 289 (1929). It simply held that the Standard Clause is consistent with the Foreign Assistance Act, as construed in light of its language, purpose, and history. The only other court of appeals to consider petitioners' statutory arguments has correctly rejected them. *DKT Memorial Fund*, 887 F.2d at 280-281, aff'g 691 F. Supp. 394, 401-403 (D.D.C. 1988). There is no warrant, accordingly, for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF ASSOCIATION FOR VOLUNTARY SURGICAL CONTRACEPTION, THE PATHFINDER FUND, THE POPULATION COUNCIL, CENTER FOR POPULATION AND FAMILY HEALTH, THE ALAN GUTTMACHER INSTITUTE, INTERNATIONAL PROJECTS ASSISTANCE SERVICES, INTERNATIONAL WOMEN'S HEALTH COALITION AND POPULATION CRISIS COMMITTEE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1169

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., *et al.*,

Petitioners,

v.

AGENCY FOR INTERNATIONAL DEVELOPMENT, *et al.*,

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BRIEF OF ASSOCIATION FOR VOLUNTARY SURGICAL CONTRACEPTION, THE PATHFINDER FUND, THE POPULATION COUNCIL, CENTER FOR POPULATION AND FAMILY HEALTH, THE ALAN GUTTMACHER INSTITUTE, INTERNATIONAL PROJECTS ASSISTANCE SERVICES, INTERNATIONAL WOMEN'S HEALTH COALITION AND POPULATION CRISIS COMMITTEE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

Amici are domestic, private, nonprofit organizations involved in the fields of international family planning and reproductive health care.[1] In the course of their activi-

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[1] Letters of consent to the filing of this Brief from all parties have been submitted to the Court. A description of each *amicus* is set forth in the Appendix to the Brief.

ties, *amici* are regularly confronted with the maternal morbidity and mortality caused by unsafe abortions. Every year an estimated 30-45 million women in developing countries resort to abortion, and 125,000 to 250,000 of these women die from "botched" abortions. An uncounted number of those who live are left with permanent health problems.[2] Desperate women may drink toxic solutions, or seek to induce abortions with sharp objects such as chicken feathers or meat skewers, causing infections and severe hemorraging.[3] Hospitals in developing countries are overwhelmed with women suffering the effects of septic, or infected, and incomplete abortions. The women may be forced to wait for twelve hours or more, bleeding, on the concrete floors of hospital hallways to see a physician or for an operating room to become available. No blankets or other covers are provided.[4] These women are of all ages and backgrounds. Some are adolescents and some already have five or more children.[5]

As part of their work, *amici* want to help groups in the developing countries address these terrible problems. Some of *amici*, such as Association for Voluntary Surgical Contraception, Center for Population and Family Health, The Pathfinder Fund and The Population Council, are major participants in the international family planning assistance program administered by the Agency

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[2] A. Germain and J. Ordway, *Population Control and Women's Health: Balancing the Scales*, International Women's Health Coalition (June 1989) at 5.

[3] *The Effect of the Mexico City Policy on International Family Planning: Hearing Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs*, 101st Cong., 1st Sess. 27-28 (1989) ("Subcommittee Hearing").

[4] M.A. Castle, R. Likwa and M. Whittaker, *Observations on Abortion in Zambia* (May 1989).

[5] J. Blane and M. Friedman, *Mexico City Policy Implementation Study*, prepared for AID by the Population Technical Assistance Project (Nov. 1990) ("Implementation Study"), Appendix B.

for International Development ("AID") under the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2151, *et seq.* Under cooperative agreements or other arrangements with AID, they subcontract millions of dollars to family planning projects run by governmental and nongovernmental organizations ("NGOs") in developing countries.

AID's cooperative agreements include the Standard Clause that is being challenged by petitioners, the Planned Parenthood Federation of America, the Planned Parenthood Center of El Paso, and certain individuals.[6] The Standard Clause, which is intended to implement the Mexico City Statement issued by the United States government at the International Conference on Population at Mexico City in 1984, provides that foreign NGOs that receive AID funds may not use funds from *any* source for a broad range of speech-related activities that are defined to be "actively promoting abortion as a method of family planning." These activities include giving women accurate, complete medical information about all their options in the event of pregnancy, publicly disseminating information about the need for safe abortions, and lobbying for changes in restrictive abortion laws.[7]

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[6] A complete description of the Clause and the *Planned Parenthood Federation of America* litigation is contained in the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[7] In addition, many NGOs that are subject to the Standard Clause have approached "the abortion question with an overcautiousness that extends to activities clearly permitted under the [Clause]. This overcautiousness is based on a fear that any association with abortion-related activities, however indirect, could place a program's funding in jeopardy." Implementation Study at 23. For example, staff in some clinics have been told not to make any abortion referrals, even under the limited circumstances under which they are permitted under the Clause—where abortion is legal and a woman has already decided she wants an abortion. *Id.* at 23-24. In other projects, employees are getting incomplete medical histories and not documenting information about abortions because project

Petitioners' Appendix ("Pet. App.") at 77a-83a. *Amici* who have signed cooperative agreements with AID are responsible for ensuring that foreign NGOs comply with the Standard Clause. *Id.*

Amici that receive AID money also subgrant other funds—which may come from private donors, other governments or international organizations—to groups in developing countries. Other *amici*, such as International Projects Assistance Services, International Women's Health Coalition and Population Crisis Committee, do not receive any AID funding to assist them in their goals of improving reproductive health care for women and encouraging voluntary family planning. Regardless of the source of funding, almost all of *amici's* projects in foreign countries are, and must be, carried out in collaboration with local groups, including NGOs.

Amici do not "actively promote" abortion as the phrase "actively promote" is generally defined. Indeed, their work is directed at reducing the need for women to resort to abortion by promoting the availability of contraception. However, *amici* believe that if contraceptives fail or are not available, women should be able to have access to safe abortions, rather than being forced to resort to dangerous clandestine procedures. They can only

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directors are afraid to have the word "abortion" in their medical charts. *Id.* at 24. Physicians who work part-time in private AID-funded clinics in Bangladesh, where menstrual regulation is legal, have been told that they cannot perform this procedure in their private practices or in government clinics. *Id.* at 25.

Data collection and "a broad range of research activities" have also been adversely affected by the overcautious response to the clause. *Id.* As stated by one Egyptian family planner: "Since the Mexico City Policy took place, all discussion of abortion and abortion-related issues has stopped. Those receiving A.I.D. funding are frightened of the policy and have thus turned their backs on a significant health issue [septic abortions] that is important in the context of female reproductive health." *Id.*

attempt to begin to provide such access by collaborating with organizations in the developing countries. The Standard Clause interferes with their efforts by violating *amici's* First Amendment right to associate, with non-AID funds, with foreign NGOs in speech-related activities that would help further the goals of alleviating the maternal morbidity and mortality caused by unsafe abortions, and providing complete reproductive health care. *Amici's* constitutional rights are also violated because an AID-funded domestic NGO's responsibility for enforcing the Standard Clause requires the organization to promote an anti-abortion viewpoint with which it does not agree.

REASONS FOR GRANTING THE PETITION

I. THE STANDARD CLAUSE VIOLATES AMERICANS' FIRST AMENDMENT RIGHTS OF SPEECH AND ASSOCIATION

AID recognizes that it cannot constitutionally restrict *amici's* direct use of their own funds. *FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Therefore, the Standard Clause only requires a domestic NGO to accept limits on the use of AID funds. The domestic NGO can engage in abortion-related speech with other funds, as long as those funds are kept separate and as long as the speech is not in association with AID-funded foreign NGOs. Pet. App. at 77a.

Speech in association with foreign NGOs is treated differently because AID does not allow the foreign groups the free speech and association that is cherished by Americans. If foreign NGOs want AID funding, they cannot have anything to do with speech-related activities that may be deemed to "actively promote abortion" as the Standard Clause very broadly defines "actively promote," whether those activities are funded by private groups,

governments other than the United States, or international organizations.[8]

Contrary to the decision below, the Standard Clause does not constitute merely a failure "to subsidize the exercise of a fundamental right" by domestic NGOs, which is not subject to strict scrutiny. Pet. App. at 10a. Petitioners and *amici* are not asking the government to subsidize the exercise of their rights. They are not seeking federal dollars for themselves or for foreign NGOs. The obstacle that has been placed in the path of domestic NGOs that seek to exercise freely their right to associate with foreign NGOs on abortion-related projects is not the lack of a government subsidy for these projects. Rather, it is AID's restriction on the activities in which foreign NGOs may engage with non-AID funds. Therefore, strict scrutiny is mandated. Interference with domestic NGOs' First Amendment rights can only be justified if the Clause is found to be narrowly tailored "to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *accord, Boos v. Barry*, 485 U.S. 312, 321 (1988).

This Court's decisions have established that the right to speak includes the right to be heard by persons in both this country and overseas, and that a restriction on one person's rights affects the rights of others. *Riley v. National Fed'n of the Blind of N.C.*, 487 U.S. 781, 801 n.13 (1988); *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 756-57 (1976); *Lamont v. Postmaster General*, 381 U.S. 301 (1965). Applicable precedents have also recognized that an organization's own rights are violated when government actions inhibit supporters from joining the organization or participating in

[8] The prohibitions in the Clause depend on the viewpoint of the speech. Thus, lobbying for more restrictive abortion laws and counseling women against having an abortion are not prohibited.

its work. *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958). That is the situation here.

Domestic NGOs must do their work overseas in association with local groups. They do not have the staff or the facilities to provide comprehensive family planning or other services. In addition, information, particularly information about a matter as sensitive as abortion, is communicated much more effectively by local health care providers than by outsiders. To the extent that *amici's* projects are more policy-oriented, they must work with influential local groups and officials in an effort to find and implement solutions to problems such as those caused by septic and incomplete abortions. *Amici* accordingly work in conjunction with local hospitals, health care providers, family planning organizations, universities and other groups, many of which are NGOs. Therefore, in restricting the activities of foreign NGOs that are receiving or that may wish to receive AID funds, AID is also necessarily violating the First Amendment rights of the domestic NGOs that want to collaborate with the foreign NGOs.

Many of *amici's* potential collaborators are recipients of AID funds. This is true not only because AID contributes more than 40 percent of the international population assistance that is provided in developing countries,[9] but also because *amici* such as The Pathfinder Fund and The Population Council are major subgrantors of AID funds. In this role, they have sought out and helped to promote the most effective family planning organizations and health care providers. These same grantees are therefore the groups with whom it is most logical for *amici* to collaborate on abortion-related projects.

The court below found that "the Standard Clause does not prohibit [petitioners] from exercising their first

[9] *DKT Memorial Fund v. AID*, 887 F.2d 275, 302 (D.C. Cir. 1989) (dissenting opinion).

amendment rights. [Petitioners] may use their own funds to pursue whatever abortion-related activities they wish in foreign countries." Pet. App. at 11a. However, as just shown, this is an empty right, since neither petitioners nor *amici* can meaningfully pursue any activities in foreign countries without collaborating with local organizations. Moreover, it is no answer to the Clause's interference with the right to speak and associate to suggest that petitioners and *amici* should be able to find local organizations that are not funded by AID with whom to work on projects involving non-pejorative speech about abortion. Under the decisions of this Court, they have a right to select the collaborators that they believe would be most effective in their work:

> That [a statute] leaves open "more burdensome" avenues of communication, does not relieve its burden on First Amendment expression. . . . *The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.*

Meyer v. Grant, 486 U.S. 414, 424 (1988) (citations omitted, emphasis added).

The decision below also conflicts with the decisions of this Court by suggesting that strict scrutiny of the Standard Clause is not necessary because the Clause is part of a foreign aid program. Pet. App. at 13a. The Executive's power in foreign affairs, "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). More recently, this Court examined a law whose purpose was to protect the dignity of foreign diplomats with "the most exacting scrutiny," and found it to violate the First Amendment. *Boos v. Barry*, 485 U.S. at 321-29. Thus, the fact that a program that impacts on foreign affairs is involved here does not obviate the need for strict scrutiny of the Standard Clause.

Once it is subjected to strict scrutiny, the Standard Clause cannot survive. To begin with, it does not serve any "compelling state interest, unrelated to the suppression of ideas," *Roberts v. United States Jaycees*, 468 U.S. at 623, because any alleged foreign policy interest that may be asserted by AID cannot be separated from the suppression of ideas about abortion that AID does not like.

Moreover, the ostensible goals of the Mexico City Statement could readily "be achieved through means significantly less restrictive of associational freedoms." *Id.* Foreign NGOs, like domestic NGOs and foreign governmental organizations, could be required to segregate their accounts, to ensure that no U.S. funds are used for certain abortion-related projects. This would minimize the interference with the associational freedoms of the domestic NGOs in their use of non-AID funds.

In addition, the Standard Clause goes well beyond the Mexico City Statement in its definitions of "abortion as a method of family planning" and "active promotion of abortion." Promoting abortion as a method of family planning logically means advising women not to use any contraceptive method and to rely on abortion to control the number and spacing of their children. However, the Standard Clause defines "abortion as a method of family planning" to include every abortion that is not needed because of rape or incest or to save the life—not just the health—of the mother. The "active promotion of abortion" is defined not only to preclude actively encouraging a woman to have an abortion, but also to prohibit giving her objective medical information about all her options, including abortion. Pet. App. at 80a-81a. By changing these definitions, AID could readily implement the Mexico City Statement in a manner that would be "significantly less restrictive" of the First Amendment rights of domestic NGOs.

II. THE STANDARD CLAUSE UNCONSTITUTIONALLY FORCES AMERICANS TO PROMOTE A PARTICULAR VIEWPOINT ABOUT ABORTION

Strict scrutiny of the Standard Clause is also mandated because the Clause burdens the free speech of domestic NGOs that have signed, or that might wish to enter into, cooperative agreements with AID by requiring them to promote a viewpoint about abortion with which they do not agree. Domestic NGOs are responsible for insuring that the foreign NGOs to which they subgrant AID funds are in compliance with the Clause, and are not engaged in activities that the domestic NGOs may believe are both necessary and appropriate, such as providing accurate medical information about abortion to women in family planning clinics or publicly disseminating information about the need for safe abortions to end the maternal morbidity and mortality resulting from septic and incomplete abortions.

The responsibility for enforcing the Standard Clause is substantial. Domestic NGOs must initially satisfy themselves that a potential AID subgrantee is not engaged in any abortion-related activities that are barred by the Clause, which often entails visits to clinics and inspection of records. Pet. App. at 77a-80a; Implementation Study at 9-13. The domestic NGO must obtain a written certification from each subgrantee stating that it will comply with the Clause. Compliance must then be monitored on a continuing basis. *Id.*

Insuring compliance with views about abortion that are anathema to *amici* is particularly burdensome when *amici* are working with foreign NGOs in countries where abortion is legal. For example, abortion was legalized in Turkey in 1983 in response to studies that documented the horrors of septic and incomplete abortions. About 15,000 women a year were dying from self-induced abortions, and each of these deaths left an average of four or

five children motherless.[10] As testified to by The Pathfinder Fund's representative in Turkey:

> by prohibiting [Turkish] family planning professionals from providing abortion information, education, referral, or counseling services to their clients, the U.S. is asking them to disobey their own laws. The health provider whose work or institution is supported by U.S. funds, must refuse to answer a woman when she is face to face with someone pregnant who is seeking information about abortion or abortion facilities. Since abortion is legal in Turkey, this puts the health care worker in a position that is unlawful and professionally unethical.[11]

Requiring domestic NGOs to enforce AID's anti-abortion position as a condition of receiving and subgranting AID funds is contrary to the decisions of this Court in cases such as *Wooley v. Maynard*, 430 U.S. 705 (1977) (requiring the display of the state-prescribed license tag slogan as a condition of driving a car is unconstitutional) and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (requiring the recital of the pledge of allegiance as a condition of attending public school violates the First Amendment).

CONCLUSION

The petition for a writ of certiorari should be granted.

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[10] Subcommittee Hearing at 168.

[11] *Id.* at 167.

APPENDIX

APPENDIX

Association for Voluntary Surgical Contraception ("AVSC") was incorporated in 1943 to remove obstacles to voluntary sterilization in the United States. It now has an International Division, through which it develops, funds and provides technical support for hundreds of programs throughout the developing world to make quality sterilization services available and accessible to men and women who have decided they do not want more children. AVSC does this by supporting leadership groups, service programs, research, training and provision of equipment. In its activities abroad, AVSC ordinarily works through both foreign governmental bodies and NGOs, and such collaboration is essential to the effectiveness of its projects. AVSC has a comprehensive cooperative agreement with AID for family planning funds covering the period from August 1988 through August 1993. Under this agreement, which includes the Standard Clause, AVSC can receive up to $80 million. AVSC is seeking to expand its non-U.S. government funded international activities, which now comprise close to 10 percent of its budget. It is a plaintiff-appellant in *The Pathfinder Fund v. AID*, 746 F. Supp. 192 (D.D.C. 1990), *appeal pending*, No. 90-5388 (D.C. Cir.).[1]

The Pathfinder Fund ("Pathfinder") was founded in 1957 by Dr. Clarence J. Gamble, a private philanthropist, and was one of the first U.S.-based organizations to address international population issues. Its basic objective is to increase the availability of comprehensive, safe and effective family planning services, thereby improving the welfare of families in developing countries. Pathfinder provides technical assistance, contraceptives and financial support to private and public institutions that provide

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[1] *The Pathfinder Fund v. AID, supra,* which is also a challenge to the Standard Clause, has been stayed by the United States Court of Appeals for the District of Columbia Circuit by Order of February 22, 1991, pending this Court's final decision in this case.

family planning services, education and training to thousands of people throughout the developing world each year. It has supported more than 3000 projects in over 80 countries. At present, it actively supports more than 135 projects in 25 countries. Pathfinder does and must work with foreign NGOs in order to carry out an effective program abroad. Grantees include individuals, community groups, clinics, hospitals, professional organizations, medical and nursing schools, and universities. Since 1967, the Fund has received regular support from AID through a series of funding agreements. It currently has a cooperative agreement with AID that extends until September 30, 1992, with a ceiling of $67 million to support family planning activities. It also receives support under regional cooperative agreements from AID missions in Brazil, Nigeria, Bangladesh, Swaziland, Burundi and the South Pacific. All these agreements include the Standard Clause. In addition, Pathfinder actively seeks to raise funds from sources other than the U.S. government to support critical program initiatives overseas. An endowment fund has been established, and, over the last few years, non-U.S. government contributions have supported approximately 10 percent of Pathfinder's activities abroad. Pathfinder is a plaintiff-appellant in *Pathfinder v. AID*, *supra*.

The Population Council (the "Council") was established in 1952 by John D. Rockefeller 3rd. It works primarily in three areas: biomedical research in the field of human reproduction to develop and improve contraceptive methods; social science research into the causes of population change, their societal implications and appropriate policy responses; and provision of advice and technical assistance to family planning and other population-related programs at local, national and regional levels. The Council provides advice and technical assistance to governments, international agencies and foreign NGOs, and it disseminates information on population issues through publications, conferences, seminars and workshops. The

Council also manages a broad range of projects in developing countries related primarily to improving the performance of family planning programs, identifying determinants of child health and mortality and strengthening the local human and institutional resources needed in these substantive areas. Typically, the Council carries out —and of necessity must carry out—these activities abroad in collaboration with foreign governmental institutions and foreign NGOs. Many of the Council's projects abroad are supported with AID family planning funds. Under a cooperative agreement with AID which runs from July 17, 1988 to August 25, 1993, the Council will operate under a $37 million ceiling for population assistance activities. This agreement includes the Standard Clause. The Council also finances many of its activities through sources other than U.S. government agencies, and is actively seeking to expand these activities. In 1989, for example, $17 million of a total of about $30 million in grants, gifts and other revenues came from such other sources other than U.S. government agencies, and is ac-
v. AID, *supra*.

Center for Population and Family Health (the "Center") is part of Columbia University in the City of New York, and was established to address the poor health conditions that face disadvantaged populations around the world. It is especially interested in issues such as unwanted fertility, high levels of infant and maternal mortality, low infant birth weight, and infectious diseases, including AIDS. The Center addresses these concerns by providing direct services to populations in need, designing and testing innovative methods of service delivery, training future generations of public health workers, conducting relevant basic and applied research, and helping to develop policies directed at improving the status of women and their access to reproductive health care. The Center focuses its efforts on two populations: those people living in its immediate environs (a low-income, largely black and Hispanic community in New York City), and those who live in the villages and urban slums

of developing countries. With regard to the latter population, the Center receives funds from many private sources and has also been a major recipient of AID funds in support of family planning activities in developing countries for some years. It uses both the private and the AID funds to work in collaboration with foreign governmental and nongovernmental organizations.

The Alan Guttmacher Institute ("AGI") is engaged in research, policy analysis, and public education, serving opinion leaders, professionals, and public officials concerned with policy issues related to human reproduction in this country and abroad. AGI's concerns encompass needs and problems of the developing world. AGI publishes a quarterly journal, *International Family Planning Perspectives*, under a grant from AID.

International Projects Assistance Services ("IPAS") works in many nations, especially underdeveloped ones, toward safe reproductive health care for women. It provides training, information, and other educational services on issues of access to and delivery of comprehensive health services, especially abortion. In countries where abortion is illegal or otherwise restricted, IPAS works within the prevailing cultural, legal, and social contexts to reduce the maternal morbidity and mortality associated with unsafe abortion practices. In countries where abortion services are not so restricted, IPAS works to improve access to safe abortion services. IPAS receives no AID funds, but occasionally works with foreign NGOs that do and would do so more widely but for the Clause. It believes that many foreign NGOs are reluctant to work with it for fear of losing eligibility for AID funding.

International Women's Health Coalition ("IWHC") seeks to improve women's reproductive health in the Third World. To that end, it promotes high-quality, comprehensive reproductive health care to enable Third World women to regulate their own fertility safely and effectively by conceiving when desired, terminating unwanted pregnancies safely, and carrying wanted pregnancies to term. IWHC supports innovative health care projects, policy-oriented field research, and public education on reproductive health issues, thereby serving as an advocate and catalyst for change in national and international population and health policies and programs. IWHC receives no AID funding, but the Clause substantially inhibits it from fulfilling its mandate by precluding formal and informal collaboration with major private organizations overseas that depend for survival on AID funds.

Population Crisis Committee ("PCC") seeks to increase public awareness, understanding and action towards the reduction of population growth rates through voluntary family planning. PCC supports privately funded projects in developing countries that provide medical training in the treatment of complications of abortion, including incompetently performed abortions, and in menstrual regulation procedures in countries where abortion is legal. Although PCC receives no AID funding, and hence is not itself required to impose the Standard Clause on the foreign NGOs with which it works, it has found that the Clause has restricted its ability to find qualified NGOs overseas to work with it on its programs, because so many of these groups are subject to the Clause. Among PCC's other activities, it conducts analyses of U.S. population assistance programs, one of which has been a comprehensive study of the impact of the Clause on family planning programs overseas.[2] The findings of this study indicate a significant decline in the availability and quality of safe, legal abortion services and of post-abortion contraceptive counseling, as well as a chilling effect on efforts to deal with the health consequences of illegal abortions, including the suppression of data and analyses related to the problem.

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[2] The results of the study are summarized in Camp, *The Impact of the Mexico City Policy on Women and Health Care in Developing Countries*, 20 N.Y.U. J. of Int'l Law & Pol. 35, 41-50 (1987).

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No. 90-1169

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.; PLANNED PARENTHOOD CENTER OF EL PASO; STEWART R. MOTT; STEPHEN L. ISAACS; SOSAMMA LINDSAY, on behalf of herself and others similarly situated; and JANE DOE, on behalf of herself and others similarly situated,

Petitioners,

—v.—

AGENCY FOR INTERNATIONAL DEVELOPMENT, and RONALD W. ROSKANS, as Administrator of the Agency for International Development,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. The Clause Unconstitutionally Limits Americans' Unsubsidized Speech and Association With Foreign Nongovernmental Organizations

AID's assertion that "[t]he court of appeals' decision breaks no new constitutional ground" (R.B.[1] at 7) rests entirely on its argument that the Standard Clause is simply the government's decision not to subsidize a particular activity or the exercise of a fundamental right.

The Standard Clause is neither a " 'decision not to subsidize the exercise of a fundamental right' " (R.B. at 9, quoting *Regan v. Taxation With Representation*, 461 U.S. 540, 549 (1983)), nor a " 'refusal to subsidize' a particular activity." (R.B. at 10.) *See Lyng v. International Union UAW*, 485 U.S. 360 (1988). The Standard Clause does not condition eligibility for government funds on the use to which those funds will be put. Rather, it conditions eligibility for government funds on accepting limits on unsubsidized, entirely separate, speech. These limits are tantamount to extracting an agreement that the foreign non-governmental fund recipient not associate with Planned Parenthood for speech about abortion.

The constitutional issue does not depend upon the status of Planned Parenthood Federation of America (PPFA) as a funding intermediary for AID.[2] Contrary to AID's statement, petitioners are not complaining about "a condition on PPFA's use of federally granted funds." (R.B. at 10.) Petitioners are complaining about a condition that restricts their rights by limiting the privately-financed activities of foreign NGOs that receive, or hope to receive, AID funds. The effect of that restriction is to offer eligibility for massive amounts of government funds only to foreign NGOs that agree not to associate with Planned Parenthood. This is true regardless of the identity of the funding intermediary, and remains true even if the funds flow directly from AID.

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1 "R.B." refers to the Brief for the Respondents in Opposition.

2 PPFA is no longer a funding intermediary for AID. Petition at 3 n.3.

In *Lyng*, this Court set forth the standard for determining when an eligibility condition for government funds infringes the right of association and therefore triggers strict constitutional scrutiny. *Lyng* held that the right of association is infringed when the eligibility condition " 'order[s]' [people or organizations] not to associate together, . . . 'prevent[s]' them from associating together, or burden[s] their ability to do so in any significant manner." 485 U.S. at 366 (citing *Lyng v. Castillo*, 477 U.S. 635, 638 (1986)).[3]

Contrary to AID's assertion that, "[t]he Standard Clause does none of those (R.B. at 9)," in fact, it does all of them. The Clause goes beyond controlling the use of government funds: it "orders" foreign NGOs not to associate with Planned Parenthood with private funds and in separate programs, and likewise "prevents" them from doing so; and it surely "burdens" Planned Parenthood's ability to associate with the foreign NGOs "in any significant manner." (Pet.[4] at 5-6, 13 n.6.)

Stripped of AID's mischaracterizations, the reality of the court of appeals' decision remains. The court of appeals held that government is free to interfere with the exercise of fundamental rights, without "strict scrutiny," so long as it does so by limitations on eligibility for its funds. That holding "breaks new constitutional ground" because it conflicts with this Court's prior "subsidy" decisions. (Pet. at 11-20.) Unlike those prior decisions, the court of appeals' decision makes the unsubsidized exercise of constitutional rights vulnerable to the immense leverage of conditions on unrelated government subsidies. Therefore the holding of the court of appeals should be reviewed by this Court.

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3 The *Lyng* inquiry goes beyond the question of whether the restriction is attached to a subsidy. It depends on the terms of the restriction and the facts. See *Pathfinder Fund v. AID*, 746 F.Supp 192, (D.D.C. 1990), *appeal held in abeyance*, No. 90-5388 (D.C. Cir. 1991). *See also*, *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537, 548 (1987) ("the evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes").

4 "Pet." refers to the Petition for Writ of Certiorari.

II. The Clause Unconstitutionally Censors Information About Abortion That American Women Overseas May Receive

AID's argument here depends upon indulgence of a fiction already rejected by this Court. AID argues that if foreign NGOs abandon the provision of information about abortion, it will be "because they have determined that they would rather receive AID funds, . . . but that is a consequence of the foreign NGO's free choice." (R.B. at 10.)

The same argument, however, would have dictated a different result in *Babbitt v. Planned Parenthood*, 479 U.S. 925 (1986). There, this Court summarily affirmed a holding that a state statute which denied government funds to organizations that provided privately funded abortion counseling created an unconstitutional penalty on women's right to receive information about and have access to abortion.

AID's argument also would have eliminated the constitutional problem that this Court alluded to in *Webster v. Reproductive Health Services*, 109 S. Ct 3040, 3052 n.8 (1989), when it cautioned against a state barring doctors who perform abortions in private facilities from the use of public facilities for any purpose.

In *Babbitt*, an organization's cessation of providing abortion information would have been as much a "consequence of [its] free choice" as the foreign NGO's cessation of providing abortion information is here. Likewise, in *Webster*, the doctor's choice not to perform abortions in private facilities would have been as much a "consequence of [his or her] free choice" as for the foreign NGOs here.

Yet, in *Babbitt*, such government coercion was rejected, and in *Webster*, the prospect of such coercion was cautioned against, because such coercion was or would have been a penalty—denial of a government benefit—imposed upon health care providers as a result of their choices to provide wholly private, constitutionally protected medical assistance.

The court of appeals' decision here upholds precisely the opposite result. Therefore, it must be reviewed.

III. The Clause Unconstitutionally Forces American Organizations To Espouse Particular Beliefs

AID dismisses in a single paragraph PPFA's argument that the Standard Clause violates the first amendment by requiring PPFA to espouse and circulate particular ideas that it finds repellent. AID maintains that PPFA has "no right to insist in court that a government program in which it does not wish to participate be changed into the type of program in which it would like to participate." (R.B. at 11.) This entirely misses the point of PPFA's "forced speech" claim.

PPFA objects not to the government requiring that it abide by restrictions on using government funds, but to insisting that PPFA make prescribed statements about broader issues as a condition of participating in the government program. As explained in the petition (Pet. at 23), the agreements that AID requires its American grantees to secure from foreign subgrantees entail the American grantees, such as PPFA, espousing, and even winning agreement to, highly controversial propositions about abortion in general, not merely about the use to which AID funds can be put.

It is no answer to say, as AID does, that PPFA can avoid having to circulate repellent ideas by dropping out of the AID-funded program,[5] any more than it would have been an answer in *Wooley v. Maynard*, 430 U.S. 705 (1977) that no one is forced to drive a car, or in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) that no one is forced to work for the government. This Court has already made clear in

5 In any case, dropping out of the AID program—as PPFA has in fact done, rather than sign the Clause—does not eliminate the Clause's impact on its constitutional rights. As noted above, petitioners' constitutional objections to the Clause's restriction of their opportunities to associate with foreign groups apply with equal force whatever the mechanism by which AID requires foreigners who receive its funds to shun association with Americans whose views on abortion differ from AID's.

Pacific Gas and Electric v. Public Utilities Comm'n of California, 475 U.S. 1 (1986) and in *Maynard* that it is no defense of such forced speech that the statements are understood by all to be prescribed by the government, not chosen by the speaker.

Government funding pervades almost every aspect of contemporary society. Generally, of course, the government can grant funds as and to whom it wishes and can enforce the limits it chooses to put on its own subsidies. But it does not follow that it can force its grantees to make prescribed statements about unsubsidized matters. Nothing could be more destructive of freedom of expression than for the government to be permitted to demand that individuals or groups shall have financial benefits only if they state things about activities not funded by the government with which they disagree, especially where what the government requires them to say calls for violation of medical ethics as well as of deeply held views.

CONCLUSION

The petition for a writ of certiorari should be granted.

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